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In the Supreme Court

OF THE

United States

OCTOBER TERM, 1984

RICHARD R. BERGERON,
Petitioner,

VS.

NACKEY S. LOEB,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NEVADA

M. KRISTINA PICKERING of
LIONEL SAWYER & COLLINS
1100 Valley Bank Plaza
50 West Liberty Street
Reno, Nevada 89501
Telephone: (702) 788-8666

W. MICHAEL DUNN of
SHEEHAN, PHINNEY, BASS & GREEN
Hampshire Plaza
1000 Elm Street
Manchester, NH 03101
Telephone: (603) 668-0300
Attorneys for Petitioner

BOWNE OF SAN FRANCISCO, INC. • 190 NINTH ST. • S.F., CA 94103 • (415) 864-2300

QUESTION PRESENTED FOR REVIEW

The Nevada probate code requires that suit on a claim against a Nevada decedent's estate be commenced in "the proper court" or be "forever barred." Suit was timely commenced against the decedent in this case, but in federal and not state court. The federal court ruled that it had jurisdiction. In the state declaratory judgment action here under review, however, the Nevada court ruled that the federal court was not "the proper court" and, the time for filing a separate state court suit having passed, that the claim in question was "forever barred."

The question presented for review is as follows:

> May a state, consistent with the Supremacy Clause of the United States Constitution, provide by statute that all claims against its decedent's estates must be brought in its state courts or be forever barred, notwithstanding the existence of federal jurisdiction over such claims?

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PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NEVADA

The petitioner Richard R. Bergeron respectfully prays that a writ of certiorari issue to review the judgment and opinion of the Supreme Court of Nevada, entered on January 25, 1984, rehearing denied on October 4, 1984.

OPINIONS BELOW

The opinion of the Supreme Court of Nevada is reported at 100 Nev. 54, 675 P.2d 397 (1984), and is set out as Appendix A. Its order denying rehearing is not officially reported, but appears as Appendix B. The trial court's order and its findings of fact, conclusions of law, and judgment and decree are also unreported; they are reprinted as Appendices C and D.

JURISDICTION

The Supreme Court of Nevada entered its opinion on January 25, 1984. A timely petition for rehearing was filed, which the Court denied on October 4, 1984. This petition for certiorari was filed within ninety days of that date. The Court's jurisdiction is invoked pursuant to 28 U.S.C. § 1257(3).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

This petition rests on the Supremacy Clause of the United States Constitution, which provides in relevant part:

> This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

U.S. Const. art. VI.

The following constitutional provisions and statutes are also involved:

Article III, section 1 of the United States Constitution, which provides in relevant part—

> The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish.

Article III, section 2 of the United States Constitution, which provides in relevant part—

> The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority;—to all Cases affecting Ambassadors, other public Ministers and Consuls;—to all Cases of admiralty and maritime Jurisdiction;—to Controversies to which the United States shall be a Party;—to Controversies between two or more States;—between a State and Citizens of another State;—between Citizens of different States;—between Citizens of the same State claiming Lands under Grants of

different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.

Section 1332(a) of title 28 of the United States Code, which provides—

> The district courts shall have original jurisdiction of all civil actions where the matter in controversy exceeds the sum or value of $10,000, exclusive of interest and costs, and is between—
>
> (1) citizens of different States . . . .

Section 147.130(1) of the Nevada Revised Statutes (1983), which provides in relevant part—

> When a claim is rejected by the executor or administrator or the district judge, in whole or in part, the holder must be immediately notified by the executor or administrator, and the holder must bring suit in the proper court against the executor or administrator within 60 days after such notice, whether the claim is due or not; otherwise the claim is forever barred.

STATEMENT OF THE CASE

Richard R. Bergeron is a New Hampshire resident. He is employed by the Union Leader Corporation, the New Hampshire corporation which publishes that state's largest newspaper, the Manchester Union Leader. Together with the other employees of the Union Leader Corporation, Bergeron entered into an agreement with William Loeb, the corporation's president and principal stockholder, that they would forego certain labor benefits if on his death he transferred ownership of the corporation to them.

Loeb died on September 13, 1981. Instead of bequeathing his stock in the Union Leader Corporation to those employed by it at the time of his death, Loeb during his lifetime transferred the stock to a trust which, by its terms, will not terminate until the deaths of the trustee

and her nine named successors. On termination of the trust, the stock is to be distributed to the employees of the Union Leader Corporation. Contrary to the promises Loeb made during his lifetime, however, the stock will go to those who are *then* employed by the corporation and not to those employed by it *as of the date of Loeb's death.*

Loeb's estate is being administered in Nevada. Bergeron's claim is, at least in part, one for damages from Loeb and, so, one for damages against his estate. Section 147.040 of the Nevada Revised Statutes (1983) requires that notice of claims against Nevada estates be given within ninety days of the executor's appointment. In keeping with this statutory provision, Bergeron duly presented his claim to Loeb's executrix, his widow Nackey S. Loeb, who later notified Bergeron of its rejection.

The Nevada probate code clearly requires that notice be given in Nevada of claims against Nevada estates. Nev. Rev.Stat. § 147.040 (1983). In addressing suits on rejected claims, by contrast, the code requires only that suit be brought in "the proper court" within sixty days of the claim's rejection. Nev. Rev. Stat. § 147.130(1) (1983). Bergeron's claim, made on behalf of all employees of the Union Leader Corporation, included claims sounding in contract, tort, and fraud and sought both damages and the imposition of a constructive trust on the stock Loeb had during his lifetime transferred into trust and out of his employees' reach. The representations giving rise to these claims had been made in New Hampshire to New Hampshire residents in return for concessions of benefit to their New Hampshire-based employer. Diversity of citizenship existed between Bergeron and his co-workers, on the one hand, and Nackey S. Loeb as Executrix of the Estate of William Loeb, on the other; in addition, venue over so much of Bergeron's claim as rested on the Securities Exchange Act of 1933 lay in New Hampshire.

Having given notice of his claims in Nevada, as required by section 147.040 of the Nevada probate code, Bergeron took the United States District Court for the District of New Hampshire to be "the proper court" in which to sue and, within the statutory sixty-day period, he commenced suit in that Court.[1]

After Bergeron brought suit in New Hampshire, Loeb's widow filed the declaratory judgment action underlying this petition in state court in Nevada. In her Nevada suit, Mrs. Loeb sought a declaration that Bergeron had failed to file suit in "the proper court" within the statutory time period and that his claims were "forever barred" as a result. Bergeron countered by filing in the United States District Court for the District of New Hampshire a motion for preliminary injunction seeking to restrain Mrs. Loeb from proceeding further with her Nevada suit. The injunction was denied. In denying the injunction, however, the federal court in New Hampshire made clear that it had jurisdiction over and intended to proceed with Bergeron's suit.

The Nevada action, meanwhile, continued. The issues raised by Mrs. Loeb's petition, including Bergeron's argument that the Nevada probate code cannot constitutionally be construed to divest the federal courts of their established

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[1]A copy of the complaint Bergeron filed in New Hampshire was made a part of the record in the Nevada proceeding here asked to be reviewed and is reprinted as Appendix E. Bergeron's complaint presents various claims for relief, including fraud, breach of contract, unjust enrichment, and violations of the Uniform Fraudulent Conveyances Act and the Securities Exchange Act of 1933. In addition to damages based on Loeb's breach of contract, the complaint asks that the District Court recognize the employees as the rightful owners of the Union Leader Corporation, and that it set aside the trust's pledge at Loeb's instance of stock to Security National Bank, annul the trust conveyance, and return the stock to Loeb's estate for distribution to Bergeron and the class he represents.

jurisdiction, were briefed and argued. Appendix F.[2] The parties did not present testimony, but did submit various exhibits to the trial court for its consideration. Among the documents submitted were the complaint Bergeron had filed in the United States District Court for the District of New Hampshire, that Court's order declaring itself possessed of jurisdiction, and its later order certifying the suit as a class action.[3]

The Nevada trial court ruled in favor of Loeb. In declaring Bergeron's claims "forever barred," it held that "the proper court" could only be a Nevada state court because Nevada's jurisdiction over claims against local decedent's estates was "exclusive." Appendix C. The Nevada trial court's express finding on this point was:

> The proper court in which the suit must be brought is, as a matter of statutory construction and substantive law, the State of Nevada District Court. The Nevada State District Court has exclusive jurisdiction over the subject matter of the rejected claim. The suit brought by Richard R. Bergeron upon his rejected claim in the Federal District Court for the State of New Hampshire was not brought in the proper court as required by NRS 147.130. Richard Bergeron's claim is therefore forever barred.

Appendix C.

Bergeron appealed. The Supreme Court of Nevada affirmed. In affirming, the Court acknowledged that the

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[2]The Nevada Supreme Court specifically acknowledges Bergeron's timely presentation of this constitutional challenge, at least insofar as it relates to the Nevada Court's ouster of concurrent federal diversity jurisdiction in cases against decedent's estates, in its order denying rehearing. Appendix B. This finding is conclusive on the issue of Bergeron's preservation of this issue. *See, e.g.*, Stern & Gressman, *Supreme Court Practice* 222-23 (5th ed. 1978).

[3]The documents to which reference is made in the text are reproduced as Appendices E, G, and H, respectively.

United States District Court for the District of New Hampshire had found that it had jurisdiction over Bergeron's claims. Whether or not it had jurisdiction, however, the federal court in New Hampshire was not, in the opinion of the Nevada Supreme Court, "the proper court" to entertain Bergeron's case. Notwithstanding Bergeron's argument that the states cannot constitutionally diminish the established subject matter jurisdiction of the federal courts, the Nevada Supreme Court agreed with Loeb and the lower court that "Nevada's strong policy favoring expeditious settlement and distribution of decedent's estates would be frustrated if suit on a rejected claim was permitted in *any* court having subject matter jurisdiction of the action" and, accordingly, held that "the Nevada state district court is the proper court to exercise *sole* jurisdiction [in this case]." Appendix A (emphasis added). The Nevada Supreme Court reaffirmed this ruling on a timely petition for rehearing.

The decision of the Nevada Supreme Court has already begun to wreak its constitutional havoc. Following entry of that Court's order denying rehearing, the United States District Court for the District of New Hampshire ordered Bergeron's class action dismissed. No reason was given for the dismissal in the order, and its effect has been suspended pending Bergeron's motion for reconsideration of it. At the hearing held on Bergeron motion for reconsideration of the order of dismissal, the judge assigned to this case indicated that he entered his order in response to the opinion and order on rehearing of the Nevada Supreme Court, although he did not indicate why he should accede to a decision which unmistakably violates the Supremacy Clause of the United States Constitution.[4]

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[4]The events recited in the text occurred after the Nevada proceedings concluded and so are not of record in this case. As matters of public record, however, supplementation of the record with evidence of them would be proper, *cf. Korn v. Franchard Corp.*, 456 F.2d 1206 (2d Cir. 1972); *Landy v. Federal Deposit Insurance*

Richard R. Bergeron now petitions this Court to review this decision by a Writ of Certiorari to the Supreme Court of Nevada.[5]

REASONS FOR ALLOWANCE OF THE WRIT

I

THE NEVADA SUPREME COURT'S DECISION CONFLICTS WITH PRIOR DECISIONS OF THIS COURT, HOLDING THAT THE STATES CANNOT CONSTITUTIONALLY DIMINISH THE ESTABLISHED JURISDICTION OF THE FEDERAL COURTS, AND FOR THAT REASON THIS COURT SHOULD ACCEPT CERTIORARI AND REVERSE

The Nevada Supreme Court has ruled that the Nevada state courts, not the federal courts, are the only proper courts in which to litigate claims such as Bergeron's. With the exception of Bergeron's federal securities claims, jurisdiction over his case may well have existed in the Nevada courts. However, jurisdiction also existed in federal court. This Court's prior decisions establish that the states cannot, consistent with the Supremacy Clause of the United States Constitution, divest the federal courts of jurisdiction by declaring the jurisdiction of their own courts to be exclusive. *E.g., Hess v. Reynolds,* 113 U.S. 73 (1885); *see also Clark v. Bever,* 139 U.S. 96, 102 (1891). The decision of the Nevada Supreme Court conflicts with these and other decisions of this Court; a writ of certiorari should issue to the Nevada Supreme Court, and its decision should be reversed, for this reason.

Corp., 486 F.2d 139, 150-51 (3rd Cir. 1973), *cert. denied,* 416 U.S. 960 (1974). In the event this Court exercises its power to bring the Nevada Supreme Court's decision before it for review, an appropriate supplementation order will be sought to include in the record in this case the recent proceedings in New Hampshire.

[5]Section 2403(b) of title 28 of the United States Code may be applicable here. Accordingly, Bergeron has notified the Attorney General of the State of Nevada that he has filed a Petition for a Writ of Certiorari with this Court and served a copy of it on the Office of the State Attorney General.

A state court cannot enlarge or restrict the jurisdiction of the federal courts. The reason for the rule, which this Court has applied in a number of cases and a number of contexts, is that

> . . . the judicial power of the United States as created by the Constitution and provided for by Congress pursuant to its constitutional authority is a power wholly independent of state action, . . . which therefore the several states may not by any exertion of authority in any form, directly or indirectly, destroy, abridge, limit, or render inefficacious.

Harrison v. St. Louis & San Francisco Railroad Co., 232 U.S. 318, 328 (1914).[6] Historically, this Court has recognized a "probate exception" to the diversity jurisdiction of the federal courts. *E.g., Markham v. Allen*, 326 U.S. 490 (1946); *Waterman v. Canal-Louisiana Bank & Trust Co.*, 215 U.S. 33 (1909). This exception, however, does not take probate cases outside the constitutional prohibition against a state divesting a federal court of its established jurisdiction; nor does it modify the cor-

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[6]The holding in *Harrison* was that a state cannot constitutionally defeat the removal jurisdiction of the federal courts by stripping a corporation of its corporate status on its exercise of the right to remove. To like effect is *Chicago & Northwestern Railway Co. v. Whitton*, 13 Wall. 270, 80 U.S. 270, 286 (1871), which, in the face of a statute purporting to restrict wrongful death suits to state courts, held that "[i]n all cases where a general right is . . . conferred [by state law], it can be enforced in any Federal court within the state having jurisdiction of the parties [; it] cannot be withdrawn from the cognizance of such Federal court by any provision of state legislation that it shall only be enforced in a state court." As noted in the text, this Court has applied this rule in a number of different contexts. For a general discussion and a thorough canvassing of the cases in point, whose subjects range from state statutes seeking to restrict eminent domain proceedings to state courts to statutes seeking to prevent foreign insurers from invoking federal diversity jurisdiction, see *Markham v. City of Newport News*, 292 F.2d 711 (4th Cir. 1961).

ollary proposition that a federal court's jurisdiction to determine its own jurisdiction cannot be diminished by state law. *Compare Wells Fargo & Co. v. Wells Fargo Express Co.,* 556 F.2d 406, 430 n.24 (9th Cir. 1977) ("a trial court [has] jurisdiction to determine its own jurisdiction") *with Markham v. City of Newport News,* 292 F.2d 711, 716 (4th Cir. 1961) ("a court, in determining its own jurisdiction, must look to the constitution and laws of the sovereignty which created it [and] [t]he laws of a state cannot . . . restrict [its] jurisdiction").

The Nevada Supreme Court's decision conflicts with these principles, which apply fully in cases touching on probate. Nearly one hundred years ago, this Court decided *Hess v. Reynolds,* 113 U.S. 73 (1885). At issue in that case was a state statute which attempted to confer on the state probate courts exclusive jurisdiction over suits which, like Bergeron's suit against Loeb, sought judgment against a decedent's estate for liabilities the decedent incurred before death. This Court there held unavailing the state's efforts to defeat federal jurisdiction. Its language applies here:

> . . . jurisdiction of the courts of the United States, in controversies between citizens of different States, cannot be ousted or annulled by statutes of the States assuming to confer it exclusively on their own courts.
>
> It may be convenient that all debts to be paid out of the assets of a deceased man's estate shall be established in the court to which the law of the domicil has confided the general administration of these assets. And the courts of the United States will pay respect to this principle in the execution of the process enforcing their judgments out of these assets, so far as the demands of justice require. But neither the principle of convenience nor the statutes of a State can deprive them of jurisdiction to hear and determine a controversy between citizens of different States

> when such a controversy is distinctly presented, because the judgment may affect the administration or distribution, in another form, of the assets of the decedent's estate. The controverted question of debt or no debt is one which, if the representative of the decedent is a citizen of a State different from that of the other party, the party properly situated has a right, given by the Constitution of the United States, to have tried originally or by removal in a court of the United States, which cannot be defeated by state statutes enacted for the more convenient settlement of estates of decedents.

Id. at 77.

So, too, in *Clark v. Bever,* 139 U.S. 96, 102 (1891):

> It is suggested that the claim in suit here is a mere incident to the marshalling and distribution of the estate of Greene; that such estate can only be administered and distributed by the state court in accordance with the laws of the State; and that the circuit court of the United States was without jurisdiction to determine whether it was or not a valid claim against that estate. This position is wholly untenable. As the proceeding involved a judicial determination as to the liability of Greene's estate for the amount of Clark's claim, with parties before the court to contest all the questions of law and fact, it was clearly a "suit," within the meaning of the Act of Congress providing for the removal of suits to the circuit courts of the United States. The removal in this case was, therefore, proper, unless it be competent for a State, by legislative enactment conferring upon its own courts exclusive jurisdiction of all proceedings or suits involving the settlement and distribution of the estates of deceased persons, to exclude the jurisdiction of the courts of the United States even in cases where the

> constitutional requirement as to citizenship is met. But this court has decided, upon full consideration, that no such result can be constitutionally effected by state legislation.

Id. at 102.[7]

Hess and *Clark* are dispositive that the Nevada Supreme Court acted unconstitutionally when it held that the federal district court in New Hampshire was not a proper court to entertain Bergeron's claims for damages from Loeb's estate. *Cf. Rice v. Rice Foundation,* 610 F.2d 471 (7th Cir. 1979) (in deciding whether the probate exception or abstention is appropriate, the various counts comprising the complaint must be analyzed individually and, if appropriate, treated separately). In addition to invoking the federal court's diversity jurisdiction over Bergeron's state law claims for money damages, the complaint Bergeron filed in New Hampshire sought (1) the imposition of a constructive trust on the stock Loeb had fraudulently transferred out of his employees' reach before his death; and (2) relief under the Securities Exchange Act of 1933.

Bergeron's request for the imposition of a constructive trust, like his prayer for money damages, rests on the diversity jurisdiction of the federal courts. This Court has not addressed *Hess* and *Clark* in the context of suits seeking either to bring assets back into a decedent's estate or to establish an agreement by the decedent, such as an agreement to make mutual wills, which will affect the estate's distribution. The lower courts that have, however, suggest

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[7]*See also Greyhound Lines v. Lexington State Bank & Trust Co.,* 604 F.2d 1151 (8th Cir. 1979); *Rosenberg v. Baum,* 153 F.2d 10 (10th Cir. 1946); *Monogram Industries, Inc. v. Zellen,* 467 F.Supp. 122 (D. Mass. 1979); *United States v. Swanson,* 75 F.Supp. 118 (D. Neb. 1947); *United States v. Estate of Slate,* 304 F.Supp. 380 (S.D. Tex. 1969), *aff'd,* 425 F.2d 1208 (5th Cir. 1970); *Hurlburt v. Eno,* 17 F.R.D. 230 (D. Vt. 1955).

that states may not in such cases constitutionally declare the jurisdiction of their courts over such matters to be exclusive any more than they may do so in the context of suits seeking to establish a damages claim against a decedent's estate. *Cf. Lamberg v. Callahan,* 455 F.2d 1213 (2d Cir. 1972); *Beach v. Rome Trust Co.,* 269 F.2d 367 (2d Cir. 1959); *Akin v. Louisiana National Bank,* 322 F.2d 749 (5th Cir. 1963); *Rosenberg v. Baum,* 153 F.2d 10 (10th Cir. 1946); *Lee v. Hunt,* 431 F.Supp. 371 (W.D.La. 1977); *In re Lummis's Estate,* 118 F.Supp. 436 (D.N.J. 1954). As for Bergeron's securities claims, the case is even more compelling: Those are claims which can *only* be brought in federal court, because federal jurisdiction over them is exclusive, 15 U.S.C. § 78aa; if the federal court is not "the proper court" for their assertion, there exists no court which is.[8]

In short, the decision of the Nevada Supreme Court divests the federal courts of their concurrent diversity and, in some instances, their exclusive federal question juris-

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[8]Other federal causes of action which survive death but as to which federal jurisdiction is exclusive include claims under the federal antitrust laws, 15 U.S.C. § 15; *Blumenstock Brothers Advertising Agency v. Curtis Publishing Co.,* 252 U.S. 436 (1920); *Rogers v. Douglas Tobacco Board of Trade, Inc.,* 244 F.2d 471 (5th Cir. 1957), and under the federal patent laws, 28 U.S.C. §§ 1338(a) and 1400; *see Everprest, Inc. v. Phillips-Van Heusen Corp.,* 325 F.Supp. 1293 (M.D. Ala. 1970) (venue in patent suits confined to district in which the patent occurred). *See also* 1A *Moore's Federal Practice* ¶ 0.201 (1983); 13 Wright, Miller & Cooper, *Federal Practice & Procedure: Jurisdiction* § 3527 (1983). In its initial opinion in this case, the Nevada Supreme Court characterized Bergeron's position as being that "the proper court" within the meaning of section 147.130(1) was, both as a matter of statutory construction and constitutional law, any court having subject matter jurisdiction over the claims sought to be litigated. Appendix A. In denying Bergeron's petition for rehearing, however, the Nevada Supreme Court states that only Bergeron's claim that the lower court's decision "unconstitutionally divests the federal courts of their concurrent jurisdic-

diction over suits against Nevada decedent's estates. This result stands in direct conflict with this Court's prior decisions on the principal points involved and those of lower courts on other, narrower points presented.[9] These conflicts justify issuance of a writ of certiorari.

II

THE HISTORICAL PROBATE EXCEPTION TO THE DIVERSITY JURISDICTION OF THE FEDERAL COURTS NEEDS CLARIFICATION, AS THE NEVADA SUPREME COURT'S CONFUSION OF THAT DOCTRINE WITH MODERN ABSTENTION CONCEPTS SHOWS

This Court has not addressed the ancient "probate exception" to the jurisdiction of the federal courts in detail since 1946. Recent lower court cases look on the probate exception less as a jurisdictional exception, except in cases

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tion in diversity cases" was properly presented; according to the Court on rehearing, the related claim that the Court's construction of that statute unconstitutionally extinguishes those claims which, like Bergeron's securities claim, can only be brought in federal court, was not. Respectfully, Bergeron submits that his constitutional challenge embraced both arguments, *cf.* Supreme Court Rule 21.1(a). His New Hampshire complaint, stating a claim under the Securities Exchange Act of 1933, was part of the slim record before the Nevada Court, and, as the Supreme Court itself initially acknowledged, Bergeron's objection to the lower court's ruling was to its ouster of other courts' subject matter jurisdiction, not narrowly to its ouster of diversity as opposed to federal question jurisdiction. *Compare Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469 (1975). Whether or not the issue may directly be raised, the fact that the decision of the Nevada Supreme Court in this case *on its face* permits the extinguishment of causes of action which can only be brought in federal court is a powerful policy reason for accepting certiorari and entering an order of reversal.

[9]Apparently, the United States District Court for the District of Nevada does not agree with the Nevada Supreme Court's interpretation of Nev.Rev.Stat. § 147.130(1), because that Court has exercised jurisdiction over such claims in at least one case involving a Nevada decedent's estate. *E.g., Federal Savings & Loan Insurance Corp. v. Fielding*, 316 F.Supp. 82 (D. Nev. 1970).

involving "pure probate," than as a branch of the abstention doctrine. That Bergeron's case is not "pure probate" but at most a candidate for abstention is virtually conceded by the Nevada Supreme Court in its order denying rehearing, where the Court protests that it did not declare the federal courts to be without jurisdiction but only that, "as a matter of policy, the Nevada state district court was the *proper,* more appropriate court for bringing suit on the claim." Appendix B (emphasis in original). Nonetheless, the Nevada Supreme Court insists that the "probate exception" applies to Bergeron's case and saves its decision from constitutional offense.

This Court should accept certiorari in this case and make clear that the probate exception involves discretionary abstention concerns and that, in cases in which federal jurisdiction exists but abstention might be ordered, the states may not dictate the jurisdictional outcome to the federal courts.

A. The "Probate Exception"

The probate exception to the jurisdiction of the federal courts is judicial, not statutory. Its historical antecedents go back to the Judiciary Act of 1789, when "matters of probate and administration were . . . within the exclusive jurisdiction of the English ecclesiastical courts and outside the reach of the High Court of Chancery and the common law courts." *Rice v. Rice Foundation,* 610 F.2d 471, 475 (7th Cir. 1979). This Court has addressed the exception many times, although it has not done so in detail since the following discussion appeared in *Markham v. Allen,* 326 U.S. 490, 494 (1946):

> It is true that a federal court has no jurisdiction to probate a will or administer an estate, the reason being that the equity jurisdiction conferred by the Judiciary Act of 1789 and § 24(1) of the Judicial Code, which is that of the English Court of Chancery in 1789, did not extend to probate matters . . . . But it has

> been established by a long series of decisions of this Court that federal courts of equity have jurisdiction to entertain suits in favor of creditors, legatees and heirs and other claimants against a decedent's estate to establish their claims so long as the federal court does not interfere with the probate proceedings or assume general jurisdiction of the probate or control of the property in the custody of the state court.
>
> . . . while a federal court may not exercise its jurisdiction to disturb or affect the possession of property in the custody of a state court . . . , it may exercise its jurisdiction to adjudicate rights in such property where the final judgment does not undertake to interfere with the state court's possession save to the extent that the state court is bound by the judgment to recognize the right adjudicated by the federal court.

(Citations omitted.)

What constitutes prohibited interference with probate proceedings is not always clear. Two tests emerge from the reported cases: One looks to the nature of the plaintiff's claim and whether it is a "pure probate" matter, *cf. Waterman v. Canal-Louisiana Bank & Trust Co.*, 215 U.S. 33 (1909); the other test looks to whether the action would be cognizable in a state court of general jurisdiction or whether exclusive jurisdiction is vested in specialized state probate courts, *e.g., Lamberg v. Callahan,* 455 F.2d 1213, 1216 (2d Cir. 1972). For a general discussion see *Rice v. Rice Foundation, supra; DiTinno v. DiTinno,* 554 F.Supp. 996, 999 (D. Mass. 1983). Neither test is solely determinative. As has been shown, a state cannot defeat federal jurisdiction by vesting exclusive jurisdiction in probate courts over what clearly are not "pure probate" matters. *E.g., Hess v. Reynolds, supra.* By the same token, states like Nevada which do not have specialized probate courts do not thereby establish the federal courts as their probate courts. *Cf. Farrell v. O'Brien,* 199 U.S. 89 (1905). The

issue, in the final analysis, depends on the strength of the local policy involved and the degree to which the exercise of federal jurisdiction threatens to disturb it. *Cf. Rice v. Rice Foundation, supra.*

The decision of the Nevada Supreme Court invokes the probate exception to justify its result, on the apparent theory that if the probate exception applies there can be no unconstitutional interference with federal jurisdiction. To the extent Bergeron's claim seeks an award of money damages against Loeb's estate, it is clear from this Court's prior decisions that the probate exception has no legitimate application here. *E.g., Hess v. Reynolds, supra.* To the extent Bergeron seeks to bring into Loeb's estate assets Loeb fraudulently removed from his employees' reach before his death, and to establish Loeb's agreement to transfer those assets to his employees, the reported decisions of the lower federal courts equally deny application of the exception in this case. *See, e.g., Looney v. Capital National Bank*, 235 F.2d 436 (5th Cir. 1956); *Holt v. King*, 250 F.2d 671 (10th Cir. 1957); *Anderson v. Benson*, 117 F.Supp. 765 (D.Neb. 1953); *Brownell v. Leutz*, 136 F.Supp. 783 (D.N.D. 1956); *Blakeman v. Conroy*, 512 F.Supp. 325 (E.D.N.Y. 1981); *Quinlan v. Empire Trust Co.*, 139 F.Supp. 168 (S.D.N.Y. 1956).

B. Abstention and the Probate Exception

This Court has yet to address the probate exception in light of modern abstention cases such as *Louisiana Power & Light Co. v. City of Thibodaux*, 360 U.S. 25 (1959), *Burford v. Sun Oil Co.*, 319 U.S. 315 (1943), *Alabama Public Service Commission v. Southern Railway Co.*, 341 U.S. 341 (1951), and *Colorado River Water Conservation District v. United States*, 424 U.S. 800 (1976). The probate exception has drawn strong criticism, both because its contours are so uncertain it is difficult to apply (as this

case well illustrates)[10], and also for the reason that unwritten limitations on federal judicial power are disfavored and logically incapable of being applied on other than absolute terms.[11] Some recent lower court cases, therefore, "interpret this exception very narrowly." *Di Tinno*, 554 F.Supp. at 998; *Lee v. Hunt*, 431 F.Supp. at 377.

The concerns which underlie the probate exception, apart from historical allegiance to the English chancery practice as it existed in 1789, closely parallel those which have shaped modern abstention doctrine. This fact, coupled with the criticisms that have been leveled at the probate exception, have led a number of courts to recast the exception as primarily an abstention and not a jurisdictional problem. *See, e.g., Rice v. Rice Foundation, supra; Bassler v. Arrowood*, 500 F.2d 138 (8th Cir. 1974), *cert. denied*, 419 U.S. 1116 (1975); *Showers v. Sasse*, 588 F.Supp. 1297 (D.S.D. 1984); *Bugbee v. Donahue*, 483 F.Supp. 1328 (E.D. Wis. 1980); *Lee v. Hunt, supra.* This approach, now the trend, frees the matter from being a relatively absolute question of the existence or non-existence of federal jurisdiction, and recognizes it as an area of conflicting federal

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[10]As the Seventh Circuit observes in *Rice v. Rice Foundation*, 610 F.2d at 473, "the probate exception is not easily applied in particular cases." For a collection of the cases which have struggled with the probate exception to devise differing tests with varying degrees of success, see Annot., *Modern Status of Jurisdiction of Federal Courts, Under 28 U.S.C. § 1332(a), of Diversity Actions Affecting Probate or Other Matters Concerning Administration of Decedent's Estates*, 61 A.L.R. Fed. 536 (1983).

[11]The court in *Lee v. Hunt*, 431 F.Supp. at 377, opines that the 1948 amendments to the Judiciary Act of 1789 were enacted "ostensibly to remove the statutory foundation upon which . . . limiting interpretations [such as the probate exception] had arisen [, but that] the attempt failed and the exceptions remained." *Accord, Spindel v. Spindel*, 283 F.Supp. 797 (E.D.N.Y. 1968). Other courts, while deploring the uncertainty which attends the probate exception, do not view the 1948 amendments to the Judicial Code so expansively. *Rice v. Rice Foundation*, 610 F.2d at 475 n.6.

and state interests requiring attention to the effects exercise of federal jurisdiction might have in particular cases.

As has been shown, the probate exception does not take Bergeron's case outside the jurisdiction of the federal courts. *See, e.g., Hess v. Reynolds, supra; Looney v. Capital National Bank,* 235 F.2d 436 (5th Cir. 1956); *Holt v. King,* 250 F.2d 671 (10th Cir. 1957); *Anderson v. Benson,* 117 F.Supp. 765 (D. Neb. 1953); *Brownell v. Leutz,* 136 F.Supp. 783 (D.N.D. 1956); *Blakeman v. Conroy,* 512 F.Supp. 325 (E.D.N.Y. 1981); *Quinlan v. Empire Trust Co.,* 139 F.Supp. 168 (S.D.N.Y. 1956). Under these cases, properly construed, the most that can be said is that abstention could have applied here.[12] Whether to abstain, however, is a discretionary determination the federal courts have jurisdiction to make. It is not an area in which the states can legislatively prefer the jurisdiction of their courts to that of the federal courts. *Compare Hess v. Reynolds, supra with Washington v. Washington State Commercial Passenger Fishing Vessel Association,* 443 U.S. 658 (1979).

The probate exception, its relationship to abstention, and the leeway afforded the states in declaring their jurisdiction in matters arguably suited for abstention to be exclusive need clarification. This case presents the opportunity for that much-needed clarification to occur.

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[12]In its opinion, the Nevada Supreme Court concedes that the New Hampshire federal court had determined that it had jurisdiction in this case. Appendix A. The difficulty, according to the Court, was that the Nevada courts were more conveniently situated to try Bergeron's claims:

> Appellant's first contention above, that this court's decision and interpretation of the phrase "in the proper court" divests the federal courts of their concurrent jurisdiction, was previously presented to us in the opening brief and at oral arguments. Our opinion specifically acknowledged that federal courts have concurrent jurisdiction over suits brought by creditors and

CONCLUSION

This Court should issue a writ of certiorari to the Supreme Court of Nevada in this case. The Nevada Supreme Court's decision conflicts with this Court's decisions; it also revives an outworn exception to federal jurisdiction and establishes it as precedent both for a broader abdication of federal jurisdiction than modern decisions countenance and for the proposition that states may dictate to the federal courts when abstention should apply.

Respectfully submitted,

LIONEL SAWYER & COLLINS
and
SHEEHAN, PHINNEY, BASS & GREEN

By: M. KRISTINA PICKERING
Attorneys for Petitioner

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other claimants against the decedent's estate to establish their claims so long as the federal court proceedings do not interfere with the state probate proceedings. We simply determined that, under the circumstances of this case and as a matter of policy, the Nevada state district court was the *proper*, more appropriate court for bringing suit on the claim under NRS 147.130(1).

Appendix B (emphasis in original; citations omitted).

APPENDIX A

OPINION

No. 14465. In the Supreme Court of the State of Nevada.

Richard R. Bergeron, Appellant, vs. Nackey S. Loeb, Executrix of the Estate of William Loeb, Deceased, Respondent.

Filed: January 25, 1984.

Appeal from a declaratory judgment by the Second Judicial District Court, Washoe County; Robert L. Schouweiler, Judge.

Affirmed.

Lionel Sawyer & Collins, Reno,
for Appellant.

Hawkins, Rhodes & Sharp, Reno,
for Respondent.

O P I N I O N

PER CURIAM:

This is an appeal from the district court's declaratory judgment in favor of respondent, Nackey S. Loeb, Executrix, and

against appellant, Richard R. Bergeron, who claims an interest in the Estate of William Loeb, Deceased. There is no dispute as to the Nevada district court's jurisdiction over the state proceeding. The lower court simply held that appellant's claim against the estate was forever barred because he had failed to file the claim in the proper court within the time limit as required by NRS 147.130(1).[1] Although appellant had filed his claim within the requisite 60 day

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1. NRS 147.130(1) provides:

> When a claim is rejected by the executor or administrator or the district judge, in whole or in part, the holder shall be immediately notified by the executor or administrator, and the holder must bring suit in the proper court against the executor or administrator within 60 days after such notice, whether the claim is due or not; otherwise the claim shall be forever barred. If the holder of a claim resides out of the county, he may be informed of the rejection of his claim by written notice forwarded to his post office address by registered or certified mail.

period, the filing occurred in the federal district court for New Hampshire.

The sole issue addressed is whether the district court erred in interpreting NRS 147.130(1) as barring with prejudice the appellant's claim against the estate. We turn to consider the propriety of that determination.

NRS 147.130(1) essentially provides that suits against the estates of Nevada domiciliaries which are not filed in the proper court within 60 days of their rejection by the administrator of the estate are forever barred. We must decide, then, what the legislature intended when it used the phrase "the proper court."

Appellant contends that the language "the proper court" denotes any court having subject matter jurisdiction over the matter in controversy. He concludes, therefore, that the federal district court has the

requisite jurisdiction. Respondent, on the other hand, argues that Nevada's strong policy favoring expeditious settlement and distribution of decedents' estates would be frustrated if suit on a rejected claim was permitted in any court having subject matter jurisdiction of the action. Respondent then concludes by urging that in instances such as the one now before the court, the Nevada state district court is the proper court to exercise sole jurisdiction over the estate assets. We agree with respondent.

In Welfare Div. v. Washoe Co. Welfare Dep't, we stated:

> The leading rule for the construction of statutes is to ascertain the intention of the legislature in enacting the statute. . . . The meaning of words used in a statute may be sought by examining the context and by considering the reason or spirit of the law or the causes which induced the legislature to enact it. The entire subject matter and the policy of the law may also be

> involved to aid in its interpretation . . . . (Citations omitted.)

88 Nev. 635, 637-38, 503 P.2d 457, 458-59 (1972).

NRS 147.130(1) is part of Title 12 of the Nevada Revised Statutes, relating to Wills and Estates of Deceased Persons. The entire statutory scheme set out in Title 12 demonstrates an intention on the part of the legislature to ensure the speedy and certain distribution of decedents' estates. For example, NRS 143.035 requires that an executor or administrator use reasonable diligence in administering an estate. It further requires him to file a report with the court explaining why the estate has not been closed within six months of his appointment if no federal tax return need be filed for the estate, and within eighteen months if a tax return is required. Subsection 4(c) of this statute provides

for revocation of the letters of an executor or administrator who has not used reasonable diligence in the administration of an estate. In addition, NRS 147.040 provides that claims against a decedent must be filed within ninety days after the first publication of notice or be forever barred; and NRS Chapter 145 generally provides for the summary administration of smaller estates. As we stated in Gardner Hotel Supply v. Estate of Clark, 83 Nev. 388, 391, 432 P.2d 495, 497 (1967): "The spirit and letter of Nevada statutes relating to the filing of claims and administration of estates speak to the policy of our laws that efficient and expedient administration is essential."

This is consistent with policy in other states respecting probate matters. See, e.g., Wittick v. Miles, 545 P.2d 121, 126 (Or. 1976), in which the Supreme Court of

Oregon stated that "[t]he purpose of the probate code is to facilitate prompt and economic administration of estates" and LoSasso v. Braun, 386 P.2d 630, 632 (Wyo. 1963), where it was noted that "the object of probate proceedings . . . is to wind up the affairs of a decedent in an orderly manner and to make distribution of assets remaining to persons entitled as speedily as is practicable." See also California Probate Code § 714 which also provides a shortened limitation period for the filing of rejected claims against an estate. The holder of such a claim must bring suit "within three months after notice of rejection if the claim is then due or if not, within two months after it becomes due; otherwise the claim shall be forever barred."

If appellant is correct that the legislature intended to allow suit to be brought

in any court arguably possessing subject matter jurisdiction, then NRS 147.130(1) would be inconsistent with the remainder of the statutory scheme and with the pronounced policy of this, and other states, supporting the speedy resolution of probate proceedings. It is difficult to conceive of a less efficient method of administering an estate than to require the Nevada district court having jurisdiction over the assets of an estate to await the final adjudications, including appeals, of any number of other courts that may be considering matters which could materially and adversely affect Nevada's established authority to proceed.

This construction of NRS 147.130(1) is further supported by the fact that probate in Nevada is in the nature of an "in rem" proceeding. In an action in rem, the court acquires jurisdiction over the estate and

all persons for the purpose of determining their rights to any portion of the estate. When proper notice has been given, the action of the probate court is conclusive as to all creditors and others interested in the estate. Monk v. Morgan, 192 P. 1042, 1044 (Cal. App. 1920), In re Estate of Seeger, 493 P.2d 281 (Kan. 1972). Bancroft's Probate Practice, §§ 40, 61 (2d ed. 1950). In addition, a court, state or federal, which first assumes jurisdiction of property is entitled to maintain and exercise its jurisdiction, to the exclusion of any other court, even to the point of enjoining proceedings in the other court. In Kline v. Burke Const. Co., 260 U.S. 226, 229 (1922), the court stated:

> It is settled that where a federal court has first acquired jurisdiction of the subject-matter of a cause, it may enjoin the parties from proceeding in a state court of concurrent jurisdiction where the effect of the action would be to defeat or impair

> the jurisdiction of the federal court. Where the action is in rem the effect is to draw to the federal court the possession or control, or actual or potential, of the res, and the exercise by the state court of jurisdiction over the same res necessarily impairs, and may defeat, the jurisdiction of the federal court already attached. The converse of the rule is equally true, that where the jurisdiction of the state court has first attached, the federal court is precluded from exercising its jurisdiction over the same res to defeat or impair the state court's jurisdiction.

In the instant case, the assets of the Loeb estate, in which appellant claims an interest, have been and remain under the jurisdiction of the Nevada district court. In addition, the trust, upon which appellant seeks to impose an equitable claim, was established and is being administered under the auspices of this same court. The assets of this trust are some 3,750 shares of Union Leader Corporation stock, registered in the name of William Loeb, the decedent. The legal situs of these shares

is Nevada, where the stock certificates are located and the trust is being administered. Certificates of stock are the physical representation of the stock and the court's possession of the certificates gives jurisdiction over the stock. The situs of the shares is the situs of the certificates. Haughey v. Haughey, 9 N.W.2d 575 (Mich. 1943). Accord, In re De Lano's Estate, 315 P.2d 611 (Kan. 1957). This administration of the decedent's estate and trust is in conformity with NRS 136.010 which gives exclusive jurisdiction of the settlement of estates to the district court of the county in which the deceased was a resident at the time of death. Appellant's action in federal district court in New Hampshire essentially petitions that court to determine the ownership of the trust res which is under the jurisdiction of the Nevada district court.

It is well established that "federal courts of equity have jurisdiction to entertain suits 'in favor of creditors, legatees and heirs' and other claimants against a decedent's estate 'to establish their claims' . . . ." Markham v. Allen, 326 U.S. 490, 494 (1945) rev'd in part on other grounds, sub nom, Clark v. Allen, 331 U.S. 503 (1946). This is an exception to the general denial of diversity jurisdiction as to probate matters. The exception applies, however, only "so long as the federal court does not interfere with the probate proceedings or assume general jurisdiction of the probate or control of the property in the custody of the state court." Id.

Here, it is abundantly clear that having another court determine the ownership of a major asset of the Loeb estate would seriously interfere with the Nevada state

probate proceedings and necessitate assumption by it of control over property now in the custody of the Nevada district court. Although we cannot, and do not, decide the propriety of the New Hampshire federal court's exercise of jurisdiction, we do conclude that appellant's action was not brought in "the proper court" as required by NRS 147.130(1).

Accordingly, we affirm the judgment of the district court.

APPENDIX B

ORDER DENYING REHEARING

No. 14465. In the Supreme Court of the State of Nevada.

Richard R. Bergeron, Appellant, vs. Nackey S. Loeb, Executrix of the Estate of William Loeb, Deceased, Respondent.

Filed: October 4, 1984.

Appellant has petitioned this court for a rehearing of our opinion in this matter affirming the declaratory judgment of the district court. See Bergeron v. Loeb, 100 Nev. 54, 675 P.2d 397 (1984). In affirming the district court's judgment, we held that appellant's claim against the respondent estate, which was filed in a New Hampshire federal court instead of the Nevada state court involved in the probate of the estate, was forever barred from assertion in Nevada because appellant failed to file the claim "in the proper court" within the

meaning of NRS 147.130(1).[1] Bergeron suggests that serious doubt exists as to the correctness of our decision, and that we should therefore grant a rehearing. In particular, Bergeron contends that our construction of NRS 147.130(1) unconstitutionally divests the federal courts of their concurrent jurisdiction in diversity cases and extinguishes those causes of action, such as antitrust or federal

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1. NRS 147.130(1), at all material times to this litigation, provided:

> When a claim is rejected by the executor or administrator or the district judge, in whole or in part, the holder shall be immediately notified by the executor or administrator, and the holder must bring suit in the proper court against the executor or administrator within 60 days after such notice, whether the claim is due or not; otherwise the claim shall be forever barred. If the holder of a claim resides out of the county, he may be informed of the rejection of his claim by written notice forwarded to his post office address by registered or certified mail.

securities claims, that can only be brought in federal court. Bergeron now argues, for the first time, that his New Hampshire suit contains a claim against the respondent estate for a violation of the Securities Act of 1934, 15 U.S.C. § 78aa, "which would presumably be extinguished by this court's decision."

Appellant's first contention above, that this court's decision and interpretation of the phrase "in the proper court" divests the federal courts of their concurrent jurisdiction, was previously presented to us in the opening brief and at oral arguments. Our opinion specifically acknowledged that federal courts have concurrent jurisdiction over suits brought by creditors and other claimants against a decedent's estate to establish their claims so long as the federal court proceedings do not interfere with the state probate

proceedings. Id. at 59, 675 P.2d at 401. See also Markham v. Allen, 326 U.S. 490, 494 (1945), rev'd in part on other grounds, sub nom, Clark v. Allen, 331 U.S. 503 (1946). We simply determined that, under the circumstances of this case and as a matter of policy, the Nevada state district court was the proper, more appropriate court for bringing suit on the claim under NRS 147.130(1). We therefore deny rehearing on this ground. NRAP 40(c)(1).

Appellant's second contention above, that our decision has the effect of extinguishing causes of action that can only be brought in federal court, is raised for the first time in this petition for rehearing. NRAP 40(c)(1) specifically precludes a party from raising a new point, for the first time, in a petition for rehearing. Furthermore, appellant's recent contention, that his New Hampshire suit involves a

federal securities claim which can only be brought in federal court, directly contradicts the position asserted in his opening brief. In his opening brief appellant conceded that the federal and state courts have concurrent jurisdiction over his suit to establish a claim against the estate. Finally, our review of the record in this matter reveals that appellant also failed to present this argument to the district court.

We decided this appeal based upon the arguments and authorities presented by the parties in their briefs and at oral argument, and upon the authorities we discovered through our own independent research. Appellant did not present this argument regarding the extinguishment of certain federal causes of action in his brief or at oral argument, and his petition for rehearing in this regard rests largely

upon citations not found in the briefs originally submitted by the parties.

As we noted in Stanfill v. State, 99 Nev. 499, 501, 665 P.2d 1146, 1147 (1983), "[t]he purpose of briefing and oral argument is to inform this court of all authorities relevant to the issues raised in the appeal. On the other hand, the primary purpose of a petition for rehearing is to inform this court that we have misread or misunderstood a statute, case or fact in the record. A party may not raise a new point for the first time on rehearing."

Because appellant's second contention above was not properly made in the first instance, we will not consider it now on rehearing. If we are confronted with this issue in the future, in a properly briefed case, a reconsideration of the issue might be appropriate

Accordingly, we hereby deny rehearing.

It is so ORDERED.

APPENDIX C

ORDER

No. 81-10236. Dept. No. 9. In the Second Judicial District Court of the State of Nevada in and for the County of Washoe.

In the Matter of the Estate of William Loeb, Deceased. Nackey S. Loeb, Executrix of the Estate of William Loeb, deceased, Plaintiff, vs. Richard R. Bergeron, Defendant.

Filed: September 17, 1982.

This matter came before the Court on plaintiff's Petition for Declaration of Rights and for Judgment that Creditors Claim be Forever Barred. The Court having reviewed the Petition, opposition thereto, Points and Authorities, and after hearing oral argument on September 9, 1982, finds as follows:

Defendant has submitted to the jurisdiction of this Court. Plaintiff is entitled

to a declaration of rights under the Uniform Declaratory Judgment Act.

By rejection of Richard R. Bergeron's claim by the Estate of William Loeb, Defendant is bound to seek relief from said rejection in a proper Court. In this instance, the State of Nevada District Court. The suit must be brought within the time limit set forth in N.R.S. 147.030. That time limit is sixty days. Defendant filed suit in the United States District Court for the District of New Hampshire, sixty-three days after the notice of rejection. The Nevada State District Court has exclusive jurisdiction over the subject matter of the rejected claim. This Court does not purport to decide the jurisdiction of the United States District Court in this matter, but instead only finds today the Federal action brought in New Hampshire was not timely and was the improper forum to

assert relief from the denial. Any relief now sought in this proceeding is barred.

It is the order of this Court that Richard R. Bergeron's claim against the Estate of William Loeb is barred.

Counsel for plaintiff is directed to prepare findings, conclusions of law and judgment in accordance with this Order.

DATED: This 17th day of September, 1982.

/s/ ROBERT SCHOUWEILER

District Judge

APPENDIX D

FINDINGS OF FACT,

CONCLUSIONS OF LAW

and

JUDGMENT AND DECREE

No. 81-10236. Dept. No. 9. In the Second Judicial District Court of the State of Nevada in and for the County of Washoe.

In the Matter of the Estate of William Loeb, Deceased. Nackey S. Loeb, Executrix of the Estate of William Loeb, deceased, Plaintiff, vs. Richard R. Bergeron, Defendant.

Filed: September 29, 1982.

This matter came before the Court on plaintiff's Petition for Declaration of Rights, and for judgment that Creditor's Claim be forever barred;

Plaintiff Nackey S. Loeb appeared by Prince A. Hawkins, Esq., of Hawkins, Rhodes & Sharp, and defendant Richard R. Bergeron

appeared by Dan C. Bowen, Esq., of Lionel, Sawyer & Collins; and

The Court having reviewed the Petition, Opposition thereto, Points and Authorities, and having duly considered the record and the evidence offered and received, and after hearing oral argument on September 1, 1982, entered its Order dated and filed September 17, 1982, that Richard R. Bergeron's Claim against the Estate of William Loeb, is barred; the Court makes its Findings of Fact, Conclusions of Law, and Judgment, as follows:

FINDINGS OF FACT

I.

William Loeb died September 13, 1981. At the time of his death he was, and since 1952 had been, a resident and domiciliary of the State of Nevada. His Will was admitted to probate by this Court on December 10, 1981, and Nackey S. Loeb was

appointed, and continues to be, Executrix thereof.

II.

Richard R. Bergeron filed a verified Creditor's Claim in this Court against the Estate of William Loeb, and Nackey S. Loeb as Executrix thereof. The Claim was sworn to March 16, 1982, and was filed March 17, 1982, and a certified copy of the Claim was admitted in evidence as plaintiff's EXHIBIT A.

III.

The claim alleges that the deceased, William Loeb, was the sole owner and shareholder of the Union Leader Corporation, and had stated that upon his death, ownership of the company would be divided equally among, and devised to, its then-employees, who were such as of his death. The claim demands a per capita pro rata

share of the company, or its cash equivalent, as a creditor of the estate.

IV.

The claim was rejected by the Executrix March 28, 1982. The Rejection and Notice of Rejection were filed with the Clerk of this court April 5, 1982. A copy of the Rejection and Notice of Rejection was mailed to Richard R. Bergeron by certified mail April 5, 1982, addressed to him, RFD 2, Danis Park Road, Goffstown, New Hampshire 03045. A certified copy of the Rejection of Claim April 5, 1982, and of the Affidavit of Mailing thereof, was admitted in evidence as plaintiff's EXHIBIT F.

V.

No suit was brought upon the rejected Claim in the State of Nevada. A suit was brought by Richard R. Bergeron against the Estate of William Loeb, The William Loeb

Union Leader Trust, and the Security National Bank of Nevada, in the State of New Hampshire, in its Federal District Court, on June 7, 1982, 63 days after Notice of Rejection of the Claim was mailed to Bergeron. It seeks, among other things, the relief sought in the Creditor's Claim here. A certified copy of the Complaint was admitted in evidence as plaintiff's EXHIBIT B; attached to that Complaint are copies of the Creditor's Claim and Notice of Rejection of the Claim.

VI.

Following the filing of the Petition and Complaint herein, and pursuant to Order of this Court, a Citation was issued to Richard R. Bergeron to appear July 20, 1982, and show cause why judgment should not be entered that his Claim against the Estate of William Loeb was barred. The Citation and Petition were personally

served upon Richard R. Bergeron in the State of New Hampshire on June 25, 1982. Richard R. Bergeron entered a general appearance herein on July 20, 1982, through his attorneys, Lionel, Sawyer & Collins.

CONCLUSIONS OF LAW

I.

This Court has jurisdiction of the subject matter of the action, and of the parties; Richard R. Bergeron has submitted himself to the jurisdiction of this Court by filing his Creditor's Claim herein, and has entered his general appearance by counsel, in this proceeding.

II.

The plaintiff is entitled to a declaration of rights under the Uniform Declaratory Judgments Act as adopted by the State of Nevada, to determine whether or not the Claim filed by Richard R. Bergeron is forever barred.

III.

Upon rejection of Richard R. Bergeron's claim by the Estate of William Loeb, defendant Bergeron is bound to seek relief from said rejection in accordance with the provisions of NRS 147.130, which requires that suit be brought within 60 days in the proper court.

IV.

The proper court in which the suit must be brought is, as a matter of statutory construction and substantive law, the State of Nevada District Court. The Nevada State District Court has exclusive jurisdiction over the subject matter of the rejected claim. The suit brought by Richard R. Bergeron upon his rejected claim in the Federal District Court for the State of New Hampshire was not brought in the proper court as required by NRS 147.130.

Richard R. Bergeron's claim is therefore forever barred.

V.

The time limit within which suit must be brought is 60 days from the date of mailing of the Notice of Rejection. Bergeron's suit in New Hampshire was brought 63 days after the date of mailing. The 60-day period prescribed by NRS 147.130 is not extended by NRCP 6(e). Richard R. Bergeron's claim is forever barred, and would be barred even if filed in Nevada District Court.

VI.

This Court does not purport to decide the jurisdiction of the United States District Court for the District of New Hampshire, but determines the federal action brought in New Hampshire was not timely, and was the improper forum to assert relief from the denial.

JUDGMENT

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that the Claim of Richard R. Bergeron against the Estate of William Loeb, and Nackey S. Loeb, Executrix of the Estate of William Loeb, is forever barred; Richard R. Bergeron is entitled to nothing from the Estate of William Loeb.

Dated, this 28th day of September, 1982.

/s/ Robert L. Schouweiler

District Judge.

APPENDIX E

COMPLAINT

Civil Action No. C82-317-L. (Class Action Jury Trial.) United States District Court for the District of New Hampshire.

Richard R. Bergeron, Plaintiff, v. Estate of William Loeb, The William Loeb Union Leader Trust, Nackey S. Loeb, (individually, as Executrix of The Estate of William Loeb, and as Trustee of The William Loeb Union Leader Trust), and the Security National Bank of Nevada Defendants.

Filed: June 7, 1982.

PRELIMINARY STATEMENT

1. This action seeks a declaration of the present right of Plaintiff and other employees of the Union Leader Corporation to receive ownership of the Corporation as of William Loeb's death. The Estate of William Loeb, by Nackey Loeb as Executrix,

has refused to pay Plaintiff's claim for his ownership interest in the Corporation. Rather, the issued and outstanding stock of the Union Leader Corporation, previously held by William Loeb, has been transferred to an entity known as the William Loeb Union Leader Trust, subject to a community property interest claimed by Nackey S. Loeb, and said stock has further been pledged and transferred to the Security National Bank of Nevada, all of which are fraudulent and unlawful attempts by Defendants to deprive Plaintiff and other employees of the Corporation of their right to receive ownership of the Corporation upon William Loeb's death, and in violation of the Uniform Fraudulent Conveyances Act as codified into the New Hampshire Revised Statutes. This action further seeks a determination that William Loeb's continuous conduct, representations and offer to

employees commencing in 1957 that they would receive ownership of the Corporation upon his death was a fraudulent and unlawful scheme of misrepresentation in violation of the Securities Exchange Act of 1934. The action further seeks permanent injunctive relief against the assets or stock of the Union Leader Corporation from being transferred or encumbered, and an order directing specific performance according to the terms of Loeb's convenant that ownership of the Union Leader Corporation be transferred to employees of the Corporation as of the date of his death.

JURISDICTION AND VENUE

2. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. §1331 and 15 U.S.C. §78aa, this being an action arising in part under Section 10(b) of the Securities Exchange Act of 1934, as amended (the "Exchange Act"), 15 U.S.C. §§78a et seq.,

and Rule 10b-5, 17 C.F.R. §240.106-5 promulgated thereunder, and the principles of pendent jurisdiction. Jurisdiction is also invoked pursuant to 28 U.S.C. §1332, there being diversity among the parties. The amount in controversy, exclusive of interests and costs, exceeds $10,000. The Plaintiff further invokes the jurisdiction of the Court under the provisions of the Federal Declaratory Judgment Act, 28 U.S.C. §2201 et seq., seeking a declaration that the Defendants' actions violate the rights of Plaintiff to own stock in the Union Leader Corporation. Venue is appropriate to this District pursuant to 28 U.S.C. §1391.

PARTIES

3. Plaintiff Richard R. Bergeron (hereinafter sometimes also "the Plaintiff") is an individual residing at Danis Park Road, Goffstown, New Hampshire. He is now and

has been for all times relevant herein employed by the Union Leader Corporation as a pressman, and also presently serves as President of Local 267 of the International Printing and Graphic Communications Union. He brings this action for himself in his individual capacity and on behalf of the entire class of Union Leader Corporation employees similarly situated.

4. William Loeb, whose Estate is a Defendant herein, was an individual who deceased September 13, 1981 in Burlington, Massachusetts, and at the time of his death and for all times relevant herein was domiciled and residing at Prides Crossing, Beverly, Massachusetts, and was, from 1946 until his death, President of the Union Leader Corporation, a New Hampshire corporation located in Manchester, New Hampshire (hereinafter sometimes also "the Corporation"). At the time of his death, William

Loeb was the owner-in-fact of 100% of the issued and outstanding stock of the Corporation.

5. Defendant Nackey S. Loeb (hereinafter sometimes also "the Defendant Loeb") is an individual domiciled and residing at Prides Crossing, Beverly, Massachusetts. She was the spouse of William Loeb since July 15, 1952 until the time of his death, is the Executrix and sole beneficiary of the Estate of William Loeb, is presently the sole Trustee of the so-called "William Loeb Union Leader Trust", and is currently President of the Union Leader Corporation.

6. Defendant William Loeb Union Leader Trust, as amended from time to time (hereinafter sometimes also "the Trust"), was created as a revocable inter vivos trust in Manchester, New Hampshire on August 17, 1979 by its self-named grantors, William Loeb and Nackey S. Loeb, amended at Prides

Crossing, Beverly, Massachusetts on August 25, 1980, and against on June 1, 1981, and purports under its terms to be governed by the laws of the State of Nevada, including the Spendthrift Trust Act of Nevada. [A copy of the Trust dated August 17, 1979, and the two known amendments thereto of August 25, 1980 and June 1, 1981 are appended to this Complaint as ATTACHMENT A].

7. Defendant Security National Bank of Nevada (hereinafter sometimes also "the Security National Bank" or "SNB") is a national banking association organized under the laws of the United States of America, and located at One East Liberty Street, Reno, Nevada 89504.

CLASS ACTION ALLEGATIONS

8. The named Plaintiff brings this action individually and on behalf of the entire class of persons similarly situated

pursuant to Rules 23(a) and 23(b) of the Federal Rules of Civil Procedure.

9. The class of persons represented by the Plaintiff consists of all persons who were common law employees of the Union Leader Corporation as of the time of William Loeb's death on September 13, 1981.

10. The members of Plaintiff's class are so numerous that joinder is impracticable. Although the exact size of Plaintiff's class is not yet known, it is believed to be comprised of the more than 250 persons who were employees of the Corporation as of William Loeb's death and whose identification is subject to precise determination through information within the control of the Defendant Nackey Loeb.

11. Questions of law and fact common to the class predominate over any questions affecting only individual members, and a class action is superior to any other

available method for the fair and efficient adjudication of this controversy. The claims of the named Plaintiff are typical and representative of the claims of the class. The named Plaintiff has the same interests as do the other members of the class, has been advised and understands that as representative of a class this Honorable Court will oversee his conduct as acting on behalf of the interests of the plaintiff class, and the Plaintiff will vigorously prosecute those claims on behalf of the class.

12. The prosecution of separate actions by individual members of the class would create the risk of inconsistent or varying adjudications which might establish incompatible standards of conduct for the Defendant(s), and would create the risk of adjudications which would, as a practical matter, be dispositive of the interests of

the other members not parties to the adjudication and would substantially impair their ability to protect their interests.

13. The actions of Defendant(s) in denying the claims of the named Plaintiff apply to the general claims of the class as a whole, and thereby make appropriate the injunctive relief sought by this Complaint.

14. Upon information and belief: (a) No members of the class have an interest in individually controlling the prosecution of separate actions; (b) no litigation concerning the claims herein set forth has already been commenced by other members of the class; (c) it is desirable to concentrate the litigation of the claims in a single forum, and this Court is a particularly suitable forum since virtually all the class members reside within this District, the acts and transactions giving rise to the claims occurred within this

District, the information pertinent to this case is conveniently located within the District, the property claimed by the plaintiff class is located within the District, and the defendants transact business within this District; (d) venue is proper for this District; and (e) no unusual difficulties will be encountered in the management of this as a class action.

GENERAL ALLEGATIONS

15. On October 28, 1946, William Loeb established the W.L. Publishing Corporation under the laws of the State of New Hampshire for the purpose of its acquiring the business and assets of the publisher of the Manchester Union and Manchester Leader newspapers, the Union-Leader Publishing Company, from its then owner, Mrs. Frank Knox of Manchester, New Hampshire. The authorized capital stock of the W.L. Publishing Corporation consisted of 5,000

shares of common stock having the par value of $1.00 each. Subsequent to its incorporation, but not later than November 21, 1946, the corporate name of W.L. Publishing Corporation was changed to that of the "Union Leader Corporation".

16. On October 31, 1946, William Loeb purchased from Mrs. Frank Knox all of the outstanding stock of The Union Leader Publishing Company for cash in the amount of $1,257,583.33. On November 21, 1946, William Loeb purchased all 5000 shares of the authorized and issued capital stock of the Union Leader Corporation (that entity previously known and incorporated under the name "W.L. Publishing Corporation") in consideration for his transfer to the Union Leader Corporation of all of the business and assets of The Union-Leader Publishing Company. In addition to stock, William Loeb received from the Union Leader Corpo-

ration demand and serial notes aggregating in principal the sum of $1,107,583.33. William Loeb that same date transferred ownership of 2,500 shares of the 5,000 shares of Union Leader Corporation stock then held in his name to Ridder Publications, Inc., and retained individual ownership of the remaining 2,500 shares of the total authorized and issued capital stock of Union Leader Corporation.

17. On May 26, 1947, Ridder Publications, Inc. transferred to Leonard V. Finder ownership of the 2,500 shares of Union Leader Corporation stock then held by Ridder, and, on April 29, 1949, Finder transferred his ownership of the 2,500 shares of Union Leader Corporation stock to William Loeb. As of April 29, 1949, William Loeb was the sole owner of 5,000 shares of Union Leader Corporation stock,

representing the entire authorized and issued capital stock of the Corporation.

18. Beginning in 1949, William Loeb established a cash profit-sharing plan covering employees of the Union Leader Corporation, which provided that 50% of the Corporation's profits before taxes were to annually distributed among employees of the Corporation. In connection with this cash profit-sharing plan, a junior board of directors, comprised of 11 non-management representative employees, was established to review financial statements of the Corporation on a monthly, quarterly, and annual basis, and to advise the Corporation's Board of Directors with respect to major management decisions in the operation of the business.

19. In 1957, in consideration of the promise of William Loeb to the employees of the Union Leader Corporation they would

receive ownership of the Corporation upon his death, the employees of the Corporation accepted Loeb's termination of the cash profit sharing plan. During the period of its operation from 1949 to 1957, employees of the Corporation had received aggregate cash payments under the plan totalling $696,472.82.

20. In the Fall of 1957, William Loeb founded a daily newspaper in Massachusetts, the Haverhill Journal, in competition with the Haverhill Gazette, which was then being struck by the International Typographical Union. During November and December of 1957, William Loeb requested employees of the Corporation not to press demands for wage increases or other employee compensation and benefits, but rather to support Loeb in his Haverhill Journal venture by being loyal employees, staying on the job at the same rates of pay, and being avail-

able to work overtime in printing and additional newspaper, the Haverhill Journal, all in consideration for which employees of the Corporation would, according to Loeb, receive upon Loeb's death ownership of the Union Leader Corporation, enhanced by the addition of a profitable newspaper property, the Haverhill Journal.

21. On September 26, 1956, William Loeb established the Retirement Profit Sharing Plan and Trust for the Benefit of Employees of the Union Leader Corporation (hereinafter also "the deferred profit-sharing plan"), which provided that covered employees of the Corporation would annually receive allocated to their individual accounts under the Plan amounts contributed by the Corporation equal to the lesser of 25% of the Corporation's annual profits before taxes in excess of $26,000, or 15% of the annual payroll of covered employees.

22. In 1959, in consideration of employee acceptance of retroactive deletion of the provision of the deferred profit-sharing plan obligating the Corporation to make contributions to employee accounts in accordance with the formula described under Paragraph 21 above, Loeb represented to employees that they could expect the Corporation to increase $40 in value for each $1 that the Corporation used to finance continued operation of the Haverhill Journal rather than contributed to the employees' deferred profit sharing plan, and that the employees would receive the value of this corporate enhancement as owners of the Corporation upon Loeb's death. During the two-year period 1956 through 1957 that the mandatory contribution formula of the deferred profit-sharing plan was in effect, employees of the Corporation receive allocations into their

individual accounts under the plan totalling $270,000.

23. From 1957 until his death in 1981, William Loeb, by numerous verbal and written statements through a multiplicity of private and public communications to employees of the Corporation and the general public, continuously restated and confirmed his agreement and obligation that upon his death those loyal employees then employed by the Corporation would each receive pro rata capital ownership of the Union Leader Corporation.

24. By a series of transactions during the period September 30, 1956 through to July 7, 1960, William Loeb sold 1,250 shares of Union Leader Corporation stock to the deferred profit-sharing plan in consideration of his receipt of $375,000 in cash from the plan.

25. Under the terms of a personal guaranty and pledge agreement dated May 1, 1959, William Loeb did pledge to Alexander E. Cymrot, then a Director of the Corporation, all Union Leader Corporation stock then held in Loeb's name as collateral to secure a $300,000 loan from Cymrot to the Corporation. This pledge of Union Leader Corporation stock by Loeb to Cymrot as security for corporate borrowings was reaffirmed by supplemental loan agreements and promissory notes between and among Loeb, Cymrot and the Corporation dated June 1, 1959 and June 1, 1960, evidencing additional borrowings of $200,000 by the Corporation from Cymrot.

26. To finance repayment of the Corporation's balance of unpaid principal on the aforesaid borrowings from Cymrot, then outstanding in the amount of $350,000, Loeb personally borrowed $500,000 from the

Teamsters Central States, Southeast and Southwest Areas Pension Fund on or about April 8, 1963. To secure this Teamsters loan, Loeb did pledge, endorse and transfer to the Trustees of the Teamster's Pension Fund stock certificates representing all 3,750 shares of Union Leader Corporation stock then owned by Loeb and not held in trust by the deferred profit-sharing plan.

27. On or about June 25, 1965, the Union Leader Corporation borrowed $2,000,000 from the Teamsters Central States, Southeast and Southwest Areas Pension Fund, the proceeds of which were used to repay the aforementioned $500,000 borrowed in 1963 by Loeb from the Teamsters Fund and to settle certain pending anti-trust litigation, entitled Union Leader Corporation vs. Newspapers of New England, Inc., arising from Loeb's publication of the Haverhill Journal. To secure this corporate borrow-

ing, Loeb did again pledge to the Teamsters Fund all Union Leader Corporation stock of which he was shareholder of record under the terms and conditions of an Agreement and Stockholder's Pledge dated June 25, 1965.

28. The aforementioned 3,750 shares of Union Leader Corporation stock, represented by certificates numbered 1 and 16, remained in the possession and control of agents, representatives and custodians of the Teamsters Pension Fund from June 25, 1965 until on or about March 7, 1979. On said latter date, the Union Leader Corporation did borrow $900,000 from the Security National Bank of Nevada, the proceeds of which were used to pay in full the remaining balance owed the Teamsters on the 1965 loan, and by which William Loeb regained possession of the 3,750 shares of Union

Leader Corporation stock which had been held by the Teamsters Fund as collateral.

29. On or about August 17, 1979, William Loeb created the Defendant William Loeb Union Leader Trust, appointed Defendant Nackey Loeb as sole trustee thereof, and transferred to the Defendant William Loeb Union Leader Trust the 3,750 shares of Union Leader Corporation stock then registered in the name of William Loeb.

30. On or about August 25, 1980, William Loeb, Defendant Nackey Loeb, and the Defendant William Loeb Union Leader Trust did transfer and pledge the 3,750 shares of Union Leader Corporation stock then held in trust to the Defendant Security National Bank of Nevada ("SNB") as security for a $2,000,000 loan from Defendant SNB to the Union Leader Corporation. The proceeds of said loan were used by the Corporation to purchase from the Augsbury Organization

Inc. of Ogdensburg, New York, 1,250 shares of Union Leader Corporation stock. On December 31, 1979, Augsbury Organization, Inc. had purchased through bid from the deferred profit-sharing plan the 1,250 shares of Union Leader Corporation stock for $1,505,000 cash pursuant to a Consent Order dated July 9, 1979, settling the consolidated case of Mahoney v. Union Leader, et al. and Marshall v. William Loeb, et al. Upon its receipt of the stock, the Union Leader Corporation retired all 1,250 shares as treasury stock.

31. Except for the period August 17, 1979 to August 25, 1980, and since May 1, 1959, that 3,750 shares of Union Leader Corporation stock of which William Loeb had been the shareholder of record remained pledged and in the physical possession of third-party creditors of Loeb and/or the Corporation, and on the date of Loeb's death,

September 13, 1981, said stock had again been pledged and transferred to a third-party creditor - the Defendant SNB.

32. On the date of William Loeb's death the Plaintiff Bergeron was employed as a pressman of the Union Leader Corporation.

33. In December 1981, Plaintiff requested of management of the Corporation documentation relative to the estate plan of William Loeb, and on or about December 16, 1981, through William J. Hybsch, Labor Relations Director of the Union Leader Corporation, received an expurgated copy of the William Loeb Union Leader Trust, dated August 17, 1979, and also received copies of the amendments thereto dated August 25, 1980 and June 1, 1981. [Please see ATTACHMENT A to this Complaint].

34. On March 16, 1981, Plaintiff Bergeron made a claim against the Estate of William Loeb for his proportionate share of the

ownership equity and capital assets of the Union Leader Corporation (a copy of said General Claim is appended hereto as ATTACHMENT B), which claim was summarily rejected by Defendant Nackey Loeb as Executrix of and on behalf of the Estate of William Loeb (a copy of said Notice of Rejection of Claim, dated March 28, 1982, is appended hereto as ATTACHMENT C).

COUNT I

35. Plaintiff Bergeron, as an employee of the Union Leader Corporation, was party to the agreement between William Loeb and the employees of the Corporation that the death of William Loeb the Plaintiff and other employees would receive ownership of the Corporation if they would display greater worker productivity, remain in employment with the Corporation, demonstrate steadfast employee loyalty to Loeb and the Corporation, and forbear from making demand on

Loeb and the Corporation for additional employee compensation and benefits.

36. The aforementioned representations and promise of Loeb were knowingly false when made by him since, when making these representations, Loeb did not have the intention or ability to perform a transfer of ownership of the Union Leader Corporation to Plaintiff and other employees of the Corporation upon his death. Since May 1, 1959, the promise made by William Loeb was impossible of performance insofar as the Union Leader Corporation stock was pledged, endorsed and transferred to third-party creditors of Loeb and the Corporation.

37. The representations and promise made by Loeb to Plaintiff and other employees regarding their ownership of the Union Leader Corporation upon Loeb's death was made with the fraudulent intention of

inducing, or with the reasonable expectation of inducing, the Plaintiff's and other employees' reliance thereon.

38. The Plaintiff and other employees believed in and reasonably relied upon the promise and representations of Loeb in that they remained in employment with and exhibited extraordinary loyalty to Loeb and the Corporation, worked productively without job stoppage and in labor peace, and did forbear from making demand of cash or deferred compensation or additional employee benefits as would have been made in the absence of Loeb's promise of employee ownership of the Corporation upon his death, and such was the form of reliance and employee conduct and performance Loeb sought to receive when making his promise and representations.

39. The aforementioned performance of and conduct by Plaintiff and other employees

conferred a benefit upon William Loeb as then owner of the Union Leader Corporation by enabling the Corporation to operate more productively with trained and experienced employees of high morale, to increase its profits by operating with lesser expenses and reduced employee turnover, and to operate its business without the threat of disruption of systematic and peaceful labor activity.

40. The transfer by William Loeb on or about August 17, 1979 of his interest in the 3,750 shares of Union Leader Corporation stock to the William Loeb Union Leader trust did not constitute performance of but rather a breach of Loeb's promise to transfer ownership of the Corporation to Plaintiff and other employees upon Loeb's death. By operation of Paragraph 3 of said Trust (appended hereto as ATTACHMENT A), Plaintiff and other employees will not

receive ownership of the Union Leader Corporation unless employed by the Corporation as of the date of death of the next to last successor trustee of the Defendant Trust. Although the identities of the 10 successor trustees have been kept hidden from Plaintiff, such trustees are believed to include those whose present youth and natural life span make virtually certain that neither Plaintiff nor any other present employee of the Corporation will survive to receive distribution of an ownership interest in the Union Leader Corporation under the terms of said Trust.

41. During the period from approximately 1956 through to the date of his death in 1981, William Loeb directly and indirectly, by the use of the mails and other means and instrumentalities of interstate commerce, employed devices, schemes, and artifices to defraud; made untrue state-

ments of material facts and omitted to state material facts necessary in order to make the statements made, in light of the circumstances under which they were made, not misleading; and engaged in acts, practices, and courses of business which operated as a fraud and deceit upon the Plaintiff and other employees of the Corporation in connection with the offer and purchase of securities of the Union Leader Corporation, and all in violation of Section 10(b) of the Exchange Act, and Rule 10b-5 promulgated thereunder.

42. Plaintiff and other employees of the Corporation, relying upon William Loeb's fraudulent statements and omissions described above, have been damaged in not receiving the securities of the Corporation bargained for and for which consideration has been given.

WHEREFORE, Plaintiff prays this Court order the following relief:

Enjoin the Defendants, and all of them, from the sale, transfer, or encumbrance of the stock and/or business and assets of the Union Leader Corporation during the pendency of this action; direct specific performance by Defendant Nackey Loeb, as Executrix of the Estate of William Loeb and Trustee of the William Loeb Union Leader Trust, to transfer and deliver to Plaintiff and all employees of the Corporation as of September 13, 1981 their respective proportionate shares of ownership of the Union Leader Corporation; award Plaintiff the reasonable costs of this action, including counsel fees, expert fees, court costs and disbursements, as provided under the Securities Exchange Act, 15 U.S.C. §78r(a), and applicable

state and federal case law; and grant such other and further relief as may be equitable and just.

COUNT II

43. Plaintiff incorporates herein by reference Paragraphs 1 through 40 of this Complaint.

44. The conduct of Plaintiff and other employees of the Corporation, stated under Paragraphs 38 and 39 herein, constitutes sufficient consideration in support of the promise of William Loeb to transfer ownership of the Union Leader Corporation to employees of the Corporation upon his death.

45. Loeb's promise to transfer ownership of the Union Leader Corporation, and the conduct of Plaintiff and other employees taken in reliance on decedent's promise, constitutes a contract between the decedent Loeb and the Plaintiff and other employees

of the Corporation, obliging present performance by Loeb's Estate in conveying to the Plaintiff and other employees ownership of the Union Leader Corporation in accordance with said promise and agreement.

46. Under the terms of Loeb's Last Will and Testament, dated September 26, 1980 [a copy of which is appended to this Complaint as ATTACHMENT D], ownership of the Union Leader Corporation was not in fact devised to the employees of the Corporation, but rather to the named beneficiary of Loeb's entire estate, his spouse, Nackey S. Loeb, and her heirs and beneficiaries.

47. Failure of the Executrix of the Estate of Loeb to transfer ownership of the Corporation to Plaintiff and other employees as of Loeb's death constitutes a failure to perform and breach of Loeb's agreement and implied covenant of good

faith with the Plaintiff and other employees of the Corporation.

48. William Loeb was under a continuing obligation during his life to tell the truth when making representations to Plaintiff and other employees of the Corporation regarding the agreement and covenant of good faith to transfer ownership to employees of the Corporation upon his death.

49. Evidenced by Loeb's conduct in pledging and otherwise transferring and devising his ownership interest in the Union Leader Corporation to parties other than employees of the Corporation, as more particularly alleged under this Complaint, Loeb never intended to fulfill his agreement and covenant to transfer to the employees ownership of the Corporation upon his death.

WHEREFORE, Plaintiff prays this Court order the following relief:

Enjoin the Defendants, and all of them, from the sale, transfer, or encumbrance of the stock and/or business and assets of the Union Leader Corporation during the pendency of this action; direct specific performance by Defendant Nackey Loeb, as Executrix of the Estate of William Loeb and Trustee of the William Loeb Union Leader Trust, to transfer and deliver to Plaintiff and all employees of the Corporation as of September 13, 1981 their respective proportionate shares of ownership of the Union Leader Corporation; award Plaintiff the reasonable costs of this action, including counsel fees, expert fees, court costs and disbursements; and grant such other and further relief as may be equitable and just.

COUNT III

50. Plaintiff incorporates herein by reference Paragraphs 1 through 40 and Paragraphs 44 through 49 of this Complaint.

51. By operation of the above alleged promises, representations and agreement of William Loeb to transfer ownership of the Union Leader Corporation to Plaintiff and other employees of the Corporation, and by the performance and forbearance of the Plaintiff and other employees in reliance thereon, William Loeb incurred an obligation to transfer to employees of the Corporation upon his death the 3,750 shares of Union Leader Corporation stock of which William Loeb was the registered sole owner as of August 17, 1979, and which were personal assets of William Loeb. Plaintiff and other employees of the Corporation were then and are now "creditors" of William Loeb, who is their "debtor" within the

meaning of Section 1 of the Uniform Fraudulent Conveyances Act, New Hampshire RSA 545:1.

52. The transfer by Loeb of his ownership interest in Union Leader Corporation stock to the William Loeb Union Leader Corporation trust on August 17, 1979, as previously alleged under Paragraphs 30 and 40 herein, constitutes a "conveyance" within the meaning of Section 2 of said Uniform Fraudulent Conveyances Act.

53. The transfer of Union Leader Corporation stock to the Defendant Trust was made for no fair consideration, but rather gratuitously, rendering Loeb unable to pay his debts to Plaintiff and other employees of the Corporation as they became absolute and matured on the date of Loeb's death.

54. Under the terms of Loeb's promise and agreement, the only means by which Loeb could discharge his debt to Plaintiff and

other employees of the Corporation was for his Estate to deliver to them, in specie, the ownership of Union Leader Corporation represented by the stock that had been transferred by Loeb to the Defendant Trust.

55. This transfer of stock rendered Loeb "insolvent" within the meaning of Sections 2 and 4 of the Uniform Fraudulent Conveyances Act, New Hampshire RSA §§545:2 & 4, as the value of the assets of his remaining estate, on good information and belief, was less than the amount required to discharge Loeb's existing debts to Plaintiff and other employees of the Corporation as they become absolute and matured.

56. At the time of the transfer of stock to Defendant Trust, Loeb intended to and believed he would incur debts beyond his ability to pay as they matured, and intended that the effect of said transfer to the Trust would be to hinder, delay and

defraud the Plaintiff, and all other employees of the Corporation as of September 13, 1981, of their receiving the promised consideration of ownership of the Union Leader Corporation.

57. At the time of said transfer of Loeb's stock to the William Loeb Union Leader Trust, Defendant Nackey Loeb, as sole Trustee of the Defendant Trust, was fully informed as to the material facts of William Loeb's debt to employees of the Corporation and that the transfer of Loeb's property to the Defendant Trust was fraudulent as to the Plaintiff and other employees of the Corporation.

58. The transfer to the Defendant Trust of Union Leader Corporation stock owned by William Loeb is and was fraudulent as to the Plaintiff and other employees of the Corporation, whose claims are now mature.

WHEREFORE, Plaintiff prays this Court order the following relief:

Enjoin the Defendants, and all of them, from the sale, transfer or encumbrance of the stock and/or business and assets of the Union Leader Corporation during the pendency of this action; set aside and annul the August 17, 1979 conveyance of Union Leader Corporation stock from William Loeb to the Defendant William Loeb Union Leader Trust; vest title of said Union Leader Corporation stock in the Plaintiff and other employees of the Corporation as of September 13, 1981; direct specific performance by Defendant Nackey Loeb, as Executrix of the Estate of William Loeb and Trustee of the Defendant Trust, to transfer and deliver to Plaintiff and all employees of the Corporation as of September 13, 1981 their respective

proportionate shares of ownership of the Union Leader Corporation; award Plaintiff the costs of this action, including counsel fees, expert fees, court costs and disbursements; and grant such other relief as may be just and equitable.

COUNT IV

59. Plaintiff incorporates herein by reference Paragraphs 1 through 40, Paragraphs 44 through 49, and Paragraphs 51 through 58 of this Complaint.

60. On August 25, 1980, William Loeb and the Defendant Nackey Loeb executed a First Amendment to the William Loeb Union Leader Trust, which authorized the Defendant Loeb to pledge to the Security National Bank of Nevada, the Union Leader Corporation stock held by the Defendant Trust, allegedly "to constitute additional collateral for a loan to Two Million ($2,000,000.00) Dollars to

the Union Leader Corporation." [Please see ATTACHMENT A to this Complaint].

61. On or about August 25, 1980, Defendant Loeb, as trustee of the Defendant Trust, did pledge and transfer to the Security National Bank the 3,750 shares of Union Leader Corporation stock then held in trust.

62. On good information and belief, as of August 25, 1980 the value of a 100% ownership interest in Union Leader Corporation, represented by the pledge of 3,750 shares of Corporation stock, was an amount substantially in excess of $20,000,000.

63. The Defendant Security National Bank was already secured in its $2,000,000 loan to the Corporation by the real and personal property and other tangible and intangible property of the Corporation having a liquidated value substantially in excess of $2,000,000.

64. The antecedent debt of the Union Leader Corporation to SNB in the amount of $2,000,000, was and is disproportionately small as compared with the value of the stock and other collateral then pledged to Defendant SNB.

65. The stock pledge to Defendant SNB was not given for fair consideration within the meaning of Section 3 of the Uniform Fraudulent Conveyances Act, New Hampshire RSA § 545:3(II).

66. At the time of the stock pledge, Defendant SNB, through its agents, officers and representatives, had full knowledge of William Loeb's personal and financial affairs, or at least had knowledge of such facts as would have suggested a good faith investigation thereof, as to determine Loeb's obligation to transfer ownership of the Union Leader Corporation to employees of the Corporation upon Loeb's death and

that the Defendant Trust's title to the pledged stock was voidable as obtained through fraud on Plaintiff and other employees as creditors of Loeb.

67. Defendant SNB is not and was not a "purchaser for fair consideration without knowledge of the fraud at the time of the purchase" within the meaning of Section 9 of the Uniform Fraudulent Conveyances Act, New Hampshire RSA §545:0(I).

68. The pledge and transfer of Union Leader Corporation stock to Defendant SNB is and was fraudulent as to the Plaintiff and other employees of the Corporation, whose claims are now mature.

WHEREFORE, Plaintiff requests the Court to order the following relief:

Enjoin the Defendants, and all of them, from the sale, transfer or encumbrance of the stock and/or business and assets of the Union Leader Corporation

during the pendency of this action; set aside and annul the August 25, 1980 conveyance and pledge of Union Leader Corporation stock from the Defendant Trust to the Defendant SNB; vest unencumbered title of said Union Leader Corporation stock in the Plaintiff and other employees of the Corporation as of September 13, 1981; direct specific performance by Defendant Nackey Loeb, as Executrix of the Estate of William Loeb and Trustee of the Defendant Trust, to transfer and deliver to Plaintiff and all employees of the Corporation as of September 13, 1981 their respective proportionate shares of ownership of the Union Leader Corporation; award Plaintiff the costs of this action, including counsel fees, expert fees, court costs and disbursements; and grant such other relief as may be just and equitable.

COUNT V

70. Plaintiff incorporates herein by reference Paragraphs 1 through 40, Paragraphs 44 through 49, Paragraphs 51 through Paragraphs 58 of this Complaint.

71. Under the terms of the "Declaration" and Paragraph 6 of the William Loeb Union Leader Trust is contained a claim by the grantors, William Loeb and the Defendant Nackey Loeb, that the 3,750 shares of Union Leader Corporation stock then registered in the name of William Loeb is "community property".

72. As alleged in Paragraphs 15 through 17 of this Complaint, William Loeb acquired his interest in Union Leader Corporation stock prior to his marriage to Nackey S. Loeb.

73. William Loeb and Nackey S. Loeb for all times relevant to this Complaint have not been domiciliaries of the State of

Nevada, but rather domiciled in, resident of and subject to the laws of the Commonwealth of Massachusetts, a non-community property state.

74. Any appreciation in the value of Union Leader stock subsequent to the July 15, 1952 marriage of William Loeb and Nackey Loeb was not due to any services rendered by either party but by the independent economic forces of inflation, by the inherent advantage of operating a newspaper monopoly in a growing community, and by the productivity and labor peace contributed by other employees of the Corporation.

75. William Loeb and Nackey S. Loeb were each well-compensated by the Corporation for any services rendered it as officers of the Corporation.

76. The Union Leader Corporation stock transferred by William Loeb to the Defendant Trust is not community property but the separate property of William Loeb.

77. The Second Amendment to the Trust, dated June 1, 1981 (appended hereto as ATTACHMENT A), states that if the Union Leader Corporation stock is deemed not community property, at the death of the first spouse, a one half (1/2) interest in the stock shall pass to the surviving spouse in trust, and was intended to be a testamentary disposition by William Loeb, executed by him very shortly before and in contemplation of his then imminent death.

78. The Second Amendment has only one witness, that person taking the acknowledgement - Ralph Warren Sullivan, Esq., and is therefore invalid as a testamentary disposition.

79. The attempt by William Loeb under the Second Amendment to transfer stock in trust to his surviving spouse was made with the intent to further hinder, delay and defraud his creditors, Plaintiff and other employees of the Corporation, in their receipt of ownership of the Union Leader Corporation upon Loeb's death.

80. At the time of this gratuitous transfer of William Loeb's interest in Union Leader Corporation stock to Defendant Nackey Loeb, Defendant Loeb had full knowledge of William Loeb's personal and financial affairs, and his obligations to the Plaintiff and the other employees of the Corporation.

81. The conveyance of a one-half (1/2) interest in the Corporation stock to Defendant Loeb was not given for fair consideration within the meaning of Section

3 of the Uniform Fraudulent Conveyances Act, New Hampshire RSA §545:3(II).

82. The conveyance of Union Leader Corporation stock to Defendant Loeb is and was fraudulent as to the Plaintiff and other employees of the Corporation, whose claims are now mature.

WHEREFORE, Plaintiff requests the Court to order the following relief:

Enjoin the Defendants, and all of them, from the sale, transfer or encumbrance of the stock and/or business and assets of the Union Leader Corporation during the pendency of this action; declare the issued and outstanding stock of Union Leader Corporation to be the separate property of William Loeb and in which the Defendant Nackey Loeb has no interest; declare as null and void the Second Amendment to the Trust; set aside and annul the August 17, 1979 convey-

ance of Union Leader Corporation stock from William Loeb to the Defendant Trust; vest title of said Union Leader Corporation stock in the Plaintiff and other employees of the Corporation as of September 13, 1981; direct specific performance by Defendant Nackey Loeb, as Executrix of the Estate of William Loeb and Trustee of the Defendant Trust, to transfer and deliver to Plaintiff and all employees of the Corporation as of September 13, 1981 their respective proportionate shares of ownership of the Union Leader Corporation: award Plaintiff the costs of this action, including counsel fees, expert fees court costs and disbursements; and grant such other relief as may be just and equitable.

PLAINTIFF DEMANDS A TRIAL BY JURY.

Respectfully submitted,

RICHARD R. BERGERON

By his Attorneys,

SHEEHAN, PHINNEY, BASS & GREEN

PROF. ASS'N

By:/s/ Alan P. Cleveland

June 7, 1982

Alan P. Cleveland
1000 Elm Street
Manchester, New Hampshire 03101
(603) 668-0300

APPENDIX F

EXCERPTS FROM SUPPLEMENTAL

POINTS AND AUTHORITIES

No. 81-10236. Dept. No. 9. In the Second Judicial District Court of the State of Nevada in and for the County of Washoe.

In the Matter of the Estate of William Loeb, Deceased. Nackey S. Loeb, Executrix of the Estate of William Loeb, deceased, Plaintiff, vs. Richard R. Bergeron, Defendant.

Filed: August 2, 1982.

I

INTRODUCTION

Currently pending before the United States District Court for the District of New Hampshire is an action which will determine the present ownership of the Union Leader Corporation ("ULC"), entitled Richard R. Bergeron v. Estate of William Loeb, et al., Case No. C82-317. The

outcome of this litigation will be dispositive of Bergeron's rejected claim against the estate of William Loeb. Until the ownership of ULC is decided, this court should refrain from declaring Bergeron's claim "forever barred" under NRS 147.130.

II

PERTINENT FACTS

William Loeb died on September 13, 1981. His will was admitted to probate and his widow, Nackey S. Loeb, was appointed executrix of his estate on December 10, 1981. Notice to Creditors of the estate was filed on December 21, 1981 and published on December 25 and 30, 1981 and January 4, 1982. Richard R. Bergeron submitted a claim against the estate on March 17, 1982. The executrix mailed notice of rejection of this claim on April 5, 1982. Bergeron brought an action in the United States District Court for the

District of New Hampshire on June 7, 1982, seeking a declaration of the present rights to ownership of ULC.

III

ARGUMENT

A. BERGERON BROUGHT SUIT IN "THE PROPER COURT."

***

1. "The proper court" under NRS 147.130 is not exclusively a Nevada court.

NRS 147.120(1) provides in pertinent part:

> When a claim is rejected by the executor or administrator or the district judge in whole or in part, . . . the holder must bring suit in the proper court against the executor or administrator within 60 days [after notice of rejection]; otherwise the claim shall be forever barred.

The executrix's construction of the statutory provision is incongruous with its express wording. Although it is true that this court has jurisdiction over the estate, and that other courts will not interfere with the estate, it is not true that other courts are without jurisdiction to entertain an action on a rejected claim. The phrase "the proper court" is not further defined nor limited, and case law does not support the executrix's proposed restrictive reading. The executrix avers that the court in Wells v. Bank of Nevada, 87 Nev. 195, 483 P.2d 205 (1971) said that "the proper court" was the district court. But what the court actually discussed there was "whether nonaction by a personal representative in an estate proceeding is sufficient to trigger the running of the 30 [now 60] day period in which a creditor may commence an action" under NRS 147.130. Id.

at 206. The court mentions the district court because in that case the creditor did commence her action in district court. There is no indication that any other court may or may not have had jurisdiction to hear her action, nor any special discussion of the phrase "the proper court". Further the rejected claimant's suit was ruled to be timely, and the claim against the estate was not "forever barred". As stated in defendant's points and authorities filed July 20, 1982, any implication from the language of Wells, supra to the effect that defendant's action can only be brought in the district court is, at best, dicta.

The fact that a district court has original jurisdiction over civil actions under the Nevada Constitution Article 6, Section 6, does not make it the only proper court under NRS 147.130. Original jurisdiction does not necessarily mean exclusive

jurisdiction. "The judicial Power of the United States. . . shall extend to all cases ... between citizens of different states. . ." U.S. Const. Art. III. Pursuant to its Constitutional powers, Congress has granted the federal district court concurrent original jurisdiction in all civil actions between citizens of different states where the matter in controversy exceeds the sum of $10,000. 28 U.S.C. §1332. A federal district court looks exclusively to the sources of its powers -- the United States Constitution and enactments of Congress -- and not to acts of state legislatures in determining its ability to hear and decide an action. Duchek v. Jacobi, 646 F.2d 415 (9th Cir. 1981).

"The law is well settled that where the requisite diversity of citizenship and amount in controversy are present, as here,

a state statute cannot defeat federal jurisdiction over actions 'in favor of creditors, legatees and heirs' and other claimants against a decedent's estate to establish their claims against the estate." Monogram Industries, Inc. v. Zeller, 467 F.Supp. 122, 123 (D.Mass. 1979) quoting Waterman v. Canal-Louisiana Bank and Trust Co., 215 U.S. 33, 43, 30 S.Ct. 10, 12, 54 L.Ed. 80 (1909). This maxim is in harmony with the rationale of Markham v. Allen, 326 U.S. 490, 66 S.Ct. 296, 90 L.Ed. 256 (1946), that a federal court may not interfere with state probate proceedings nor control estate assets in the exclusive possession of the state probate court. A rejected claimant may establish his claim in a federal court, "but the debt thus established must take its place and share of the estate as administered by the probate court." Monogram Industries, Inc.

v. Zeller, 467 F.Supp. at 123, quoting Waterman, 215 U.S. at 43. Thus, state and federal courts have concurrent jurisdiction over suits brought to establish claims against an estate. See Republic of Iraq. v. First National City Bank, 353 F.2d 47 (2nd Cir.), cert. denied 382 U.S. 1027, 86 S.Ct. 648, 15 L.Ed.2d 540 (1965).

***

CONCLUSION

The district court in New Hampshire has already held that it has jurisdiction over the matter before it. This court should not interfere in that decision. This court should avoid any ruling which may affect defendant's claim until such time as the case in New Hampshire has been concluded.

The court should deny plaintiff's request that defendant's claim be held forever barred.

DATED this 2nd day of July, 1982.

LIONEL SAWYER & COLLINS

Attorneys for Defendant

Richard R. Bergeron

By/s/ Dan C. Bowen

APPENDIX G

ORDER ON MOTION FOR PRELIMINARY INJUNCTION

#C82-317. The United States District Court for the District of New Hampshire.

Richard R. Bergeron v. Estate of William Loeb et al.

Dated: July 16, 1982.

William Loeb, it is fair to say was a colorful and controversial figure in New Hampshire for much of the middle half of this century. Mr. Loeb was the principal stockholder of the Union Leader Corporation (ULC), publisher of the state's largest newspaper. Plaintiff herein is an employee of the ULC seeking to represent all employees. In dispute is ownership of the corporation following Mr. Loeb's death. Plaintiff contends that Mr. Loeb promised to give the Union Leader to the employees upon his death in return for the employees

giving up rights in an existing profit sharing plan, but instead established a trust that withholds ownership of the rest until the death of the next to the last of Loeb's widow and ten successor trustees. Plaintiff's complaint sounds in constructive trust, breach of contract, and fraudulent conveyance.

Mr. Loeb's estate is in the process of being probated in the Nevada courts. The plaintiff here filed a general claim against the estate. This claim was denied. Plaintiff thereupon filed the instant action. Less than a week later, the defendant herein filed an action for a declaratory judgment in the Washoe County, Nevada District Court seeking a determination that claims of creditors are forever barred. Plaintiff, who has not answered that action, now seeks a preliminary injunction enjoining the Nevada court from

proceeding with the declaratory judgment action.

The standard to be applied to a motion for a preliminary injunction in this Circuit is set out in Planned Parenthood League of Mass. v. Bellotti, 641 F.2d 1006, 1009 (1st Cir. 1981). That standard requires a four prong showing by the moving party; 1) plaintiff will suffer irreparable injury; 2) plaintiff's injury outweighs potential injury to defendants; 3) a likelihood of success on the merits; 4) public interest will not be adversely affected. The decision to issue a preliminary injunction is within the sound discretion of the trial court. See, also, Palmigiano v. Travisono, 317 F. Supp. 776 (D.R.I. 1970); Saloman North America v. AMF Inc., 484 F. Supp. 846, 848 (D. Mass. 1980).

Plaintiff seeks through this action to bring back into the estate the stock which he claimed was fraudulently conveyed to the equitable owner. That stock would then be available to be distributed to the plaintiff should he prevail upon the general claim he filed in The Nevada Probate Court. In order to obtain the relief he seeks plaintiff must prevail in both courts, but he must prevail initially in this court. If the estate is closed before the trust is pierced, the mechanism of the probate proceeding is lost. If the claim is allowed before the trust is pierced, plaintiff fears the assets of the estate will not cover the debt he claims. This argument fails to establish irreparable harm for several reasons. In the first instance, the assets at stake here are not at risk; they are held in trust. There is no claim that the trustee is breaching that

trust or that the assets are wasting, such that equity should intervene with an extraordinary remedy. Secondly, the probate proceedings are not plaintiff's only available avenue of relief. As plaintiff has alleged fraud, a constructive trust in favor of the present beneficial owners could be imposed directly upon the express trust. See, Patey v. Peaslee, 101 N.H. 26 (1957). Cf. Cornwell v. Cornwell, 116 N.H. 205, 208-209 (1976). Thirdly, there has been no showing that the assets of the estate are insufficient to pay plaintiff should he prevail in Nevada Probate Court. We disagree with plaintiff that the comparison must be between the estate as probated and the total value of the ULC. Although this action contains an as yet unruled upon motion for certification of class, it appears that plaintiff is the only employee to have filed a claim

within the time limitation of the Nevada statute. The others would be time barred. The proper comparison therefore would be between the assets of the estate and the pro-rata share of the corporation. There is no evidence indicating the inadequacy of the estate to cover this amount. The court concludes that defendant has not demonstrated he will be irreparably harmed.

The court also believes that the public interest will not be served by interceding in the state proceeding. Principles of federalism and comity long founded dictate against one sovereign interfering in the acts of another. Thus, for example, a federal court will not enjoin a state criminal prosecution until the state sovereign has acted. Younger v. Harris, 401 U.S. 37 (1971). Similarly, a federal court will abstain to avoid duplicating litigation already pending in state court.

Colorado River Water Cons. Dist. v. U.S., 424 U.S. 800 (1978).

The general rule regarding federal jurisdiction in probate matters and estate administration has been well- established to the effect that such probate proceedings are outside the power of the federal courts even where the requisite citizenship and amount in controversy have been established for purposes of diversity jurisdiction under 28 U.S.C. § 1332(a). Rice v. Rice Foundation, 610 F.2d 471, 475 (1979). The court there stated.

> Despite its long history and undisputed viability, the probate exception is not easily applied to particular cases. It is clear that "pure" probate matters are outside federal jurisdiction. Waterman v. The Canal-Louisiana Bank & Trust Co. 215 U.S. 33, 44, 30 S. Ct. 10, 54 L.Ed. 80 (1909); Mitchell v. Nixon, 200 F.2d 50, 51 (5th Cir. 1952).

Although it is clear that a federal court has no direct jurisdiction over probate actions, certain exceptions to the

general rule apply where the matter does not involve "pure" probate concerns. Rice, supra. As indicated in Bugbee v. Donahue, 483 F. Supp. 1328 (1980),"if [a] dispute merely involves a claim between the parties and is enforceable in a state court of general jurisdiction, then a federal court sitting in diversity may take jurisdiction so long as it does not interfere with the local probate proceedings or assume general jurisdiction of probate or control of property in a state court's custody."

The court is not suggesting that abstention is proper here; no one has requested the court abstain. But the cases and the policies establish that the public interest favors not enjoining the state proceeding.

The denial of the temporary restraining order is not indicia that this court is ruling that it does not have jurisdiction in this case.

One of the grounds for invoking the jurisdiction of this court is based on diversity 28 U.S.C. 1332.

Plaintiff is concerned about the stock being obviated from being attained, attached or reached either by himself, or in the event a motion for class action under R.C. P. #23 is granted which would include fellow plaintiff employees to satisfy a first judgment on the merits. According to New Hampshire law this would not be so.

Reference is made to In Re Estate of Thompson, 118 N.H. 361 where the following question was certified to the New Hampshire Supreme Court and answered affirmatively.

> If the death tax is to be apportioned, may apportionment be enforced against an intervivos trust by way of in personam jurisdiction over one of the three trustees when the trust corpus and the two remaining trustees are located in Massachusetts?

The court opines that on the state of the pleadings now before it this court has jurisdiction.

The physical assets of the trust are the premises of the Union Leader Corporation in Manchester, New Hampshire. The present plaintiff is a resident of New Hampshire; most of the employees of the Union Leader Corporation are New Hampshire residents, witnesses are mainly from New Hampshire or the contiguous Commonwealth of Massachusetts.

Plaintiff's motion for a temporary restraining order is denied solely as to Probate Court proceedings in the State of Nevada without any prejudice to the proceedings in this court.

July 16, 1982
/s/Martin F. Loughlin
Martin F. Loughlin
U.S. District Judge

Alan P. Cleveland, Esq.
David L. Broderick, Esq.
Ralph W. Sullivan, Esq.

APPENDIX H

ORDER ON MOTION TO CERTIFY

AS A CLASS ACTION

#C82-317-L. The United States District Court for the District of New Hampshire.

Richard R. Bergeron v. Estate of William Loeb, et al.

Filed: September 24, 1982.

Plaintiff has moved for an order pursuant to Rule 23(c) (1) to have the above entitled action maintained as a class action under Rules 23(b)(1) and (2) or alternately 23(b) (3) F.R.C.P. on behalf of class comprised of the plaintiff, Richard R. Bergeron, and all persons similarly situated, namely all the employees of the Union Leader Corporation on September 13, 1981.

Defendant filed a motion to stay proceedings pending action on prospective summary judgment motion which the court

denied September 21, 1982 and find same to be a dilatory tactic.

Defendant also requested a hearing on plaintiff's motion for class action which is also denied as not necessary to the court's order.

Plaintiff contends he will adequately represent the class and desires to avoid multiplicity of actions.

It is also contended that many putative members will fear that their employment opportunities will be jeopardized or they might face retaliation if they join this action. On the other side of the coin, employees who do not want to become members of the class action might be ostricized by those who do as members of the class action.

Rule 23 F.R.C.P., Class Actions states the following as prerequisite to a class action:

> One or more members of a class may sue or be sued as representative parties on behalf of all only if (1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the class, (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and (4) the representative parties will fairly and adequately protect the interests of the class which are present in the case.
>
> The court finds that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy. The matters pertinent to the findings include: (A) the interest of members of the class in individually controlling the prosecution or defense of separate actions; (B) the extent and nature of any litigation concerning the controversy already commenced by or against members of the class; (C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; (D) the difficulties likely to be encountered in the management of a class action.

23 (b) (3) F.R.C.P.

The leading case for Rule 23(b)(3) class actions is Eisen v. Carlisle & Jacquelin,

417 U.S. 156, 94 S. Ct. 2140, L. Ed. 2d 732 (1974). Here, the court addressed many significant aspects of the Rule 23 (b) class action including: 1) the requirement of notice to all members of the class, and, 2) the allocation of the costs of notice.

In considering the requirement of notice issue, the court stated the following:

> Rule 23(c)(2) provides that, in any class action maintained under subdivision (b)(3), each class member shall be advised that he has the right to exclude himself from the action on request or to enter an appearance through counsel, and further that the judgment, whether favorable or not, will bind the class members not requesting exclusion. To this end, the court is required to direct to class members "the best notice practicable under the circumstances, <u>including individual notice to all members who can be identified through reasonable effort</u>." We think the import of this language is unmistakable. Individual notice must be sent to all class members whose names and addresses may be ascertained through reasonable effort.

417 U.S. at P. 173.

In addressing the issue of the cost of notice the court stated there was no support under Rule 23 to impose the costs of notice on anyone but petitioners.

> "Where, as here, the relationship between the parties is truly adversary, the plaintiff must pay for the cost of notice as part of the ordinary burden of financing his own suit."

Eisen at 417, U.S. 178-79.

The court finds that it is practicable that a class action should be maintained. Rule 23(c)(2) F.R.C.P. states:

> In any class action maintained under subdivision (b)(3), the court shall direct to the members of the class the best notice practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort. The notice shall advise each member that (A) the court will exclude him from the class if he so requests by a specified date; (B) the judgment, whether favorable or not, will include all members who do not request exclusion; and (C) any member who does not request exclusion may, if he desires, enter an appearance through his counsel.

Said section, the court will follow.

The defendants are hereby ordered in accordance with F.R.C.P. to mail to William H. Barry, Jr., Clerk of the United States District for the District of New Hampshire a list of all employees employed by the Union Leader Corporation as of September 13, 1981 with their home addresses on or before October 15, 1982.

Motion granted.

September 23, 1982

/s/Martin F. Loughlin
Martin F. Loughlin
U.S. District Judge

Donald A. Kennedy, Esq.
Alen P. Cleveland, Esq.

Office Supreme Court, U.S.
FILED
JAN 16 1985
ALEXANDER L. STEVAS,
CLERK

No. 84-934 (2)

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1984

RICHARD R. BERGERON,
Petitioner,

v.

NACKEY S. LOEB, Executrix of the
Estate of William Loeb, Deceased,
Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of Nevada

BRIEF FOR RESPONDENT IN OPPOSITION

PRINCE A. HAWKINS
HAWKINS, RHODES & SHARP
One East Liberty Street
P.O. Box 750
Reno, Nevada 89504
(702) 786-4646

RALPH WARREN SULLIVAN
MALLOY & SULLIVAN
59 Water Street
Hingham Harbor, MA 02043
(617) 749-4141
Attorneys for Respondent

BOWNE OF SAN FRANCISCO, INC. • 190 NINTH ST. • S.F., CA 94103 Æ (415) 864-2300

QUESTIONS PRESENTED

Respondent believes petitioner did not correctly state the issue. This is not a case of diversity where Bergeron chose to bring suit in federal court in the same state where the probate was pending. He brought his suit in New Hampshire, not in Nevada. Petitioner's statement of the question does not disclose that Bergeron's suit was brought in New Hampshire.

In respondent's view, the questions presented are:

1. Is NRS 107.130 unconstitutional in requiring that when a claim against a decedent's estate has been filed in the district court in the State of Nevada, and is rejected by the Executrix, any suit to enforce that claim must be brought in the district court in Nevada, not in federal court in New Hampshire.

Note: While the Nevada Supreme Court held that the Nevada district court was the proper court, this was in the context of the suit having been filed in New Hampshire. The question of a suit in federal court in Nevada under diversity was not at issue.

2. Whether the constitutional question now presented was timely and properly raised in the courts below.

3. Whether the issue presented by this case is of sufficient importance to warrant review by this Court.

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15 U.S.C. Sec. 78aa 6

28 U.S.C. Sec. 1257(3) 2

28 U.S.C. Sec. 1332(a) 3

U.S. Constitution, Article VI, Clause 2 2

Miscellaneous

S Ct R 17 5

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Bancroft Probate Practice (2nd Ed., 1950) Sec. 40, Sec. 61 18

No. 84-934

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1984

RICHARD R. BERGERON,
Petitioner,

v.

NACKEY S. LOEB, Executrix of the
Estate of William Loeb, Deceased,
Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of Nevada

BRIEF FOR RESPONDENT IN OPPOSITION

Respondent, Nackey S. Loeb, Executrix of the Estate of William Loeb, deceased, respectfully prays that the Petition for Certiorari be denied.

OPINIONS BELOW

September 17, 1982: Order, Second Judicial District Court of the State of Nevada — petitioner's Appendix C.

September 29, 1982: Judgment, Second Judicial District Court of the State of Nevada — petitioner's Appendix D.

January 25, 1984: Opinion, Supreme Court of the State of Nevada, petitioner's Appendix A.

October 4, 1984: Order Denying Rehearing, Supreme Court of the State of Nevada, petitioner's Appendix B.

JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C. Sec. 1257(3).

STATUTORY AND CONSTITUTIONAL PROVISIONS

Nevada Revised Statutes:

> 147.040. Filing of claims: Must be filed within 90 days.
>
> 1. All persons having claims against the deceased must, within 90 days after the first publication of the notice specified in NRS 147.010, file the same, with the necessary vouchers, with the clerk of the court, who shall file and register each claim.
>
> 147.130. Rejection of claim; notice; time to file suit; service of summons; removal of executor or administrator for default.
>
> 1. When a claim is rejected by the executor or administrator or the district judge, in whole or in part, the holder must be immediately notified by the executor or administrator, and the holder must bring suit in the proper court against the executor or administrator within 60 days after such notice, whether the claim is due or not; otherwise the claim is forever barred. If the holder of a claim resides out of the county, he may be informed of the rejection of his claim by written notice forwarded to his post office address by registered or certified mail.

U.S. Constitution, Article VI:

> * * *
>
> This Constitution and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme

> Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.
>
> * * *

28 USC Sec. 1332:

> (a) The district courts shall have original jurisdiction of all civil actions where the matter in controversy exceeds the sum or value of $10,000, exclusive of interest and costs, and is between—
>
> (1) citizens of different States; . . . .

STATEMENT OF THE CASE

The Nevada statute requires that a claim against a decedent's estate be filed in the District Court for the county where the estate is being probated.

If the claim is rejected, the statute requires that suit to compel payment be brought "in the proper court." NRS 147.130. The Estate argued, and the Nevada Supreme Court held, that the legislative intent of the statute was for suit to be brought in the court in which the probate was pending.

In the instant case, Bergeron had actual notice of the probate, and did in fact file a Claim, respondent's Appendix A, on time, in the court where the probate was pending, that is, in the Second Judicial District Court of Nevada, in and for the County of Washoe. The claim was filed *with the court*, not merely presented to the executrix, as petitioner stated. His Claim was rejected, and he had actual notice of rejection. He thereafter did not file suit in the Second Judicial District Court of the State of Nevada, or in the United States District Court for the State of Nevada, but instead, filed suit in New Hampshire, in the United States Court for the District of New Hampshire.

The Nevada court, both the Second Judicial District Court, and, on appeal, the Nevada Supreme Court, held that the filing in New Hampshire did not constitute bringing suit in the proper court as required by NRS 147.130, and therefore the Creditor's Claim against the Estate was forever barred.

It is to be noted that the question of whether Bergeron might have filed in the United States District Court for the District of Nevada, not in New Hampshire, is not an issue in this case. He did not file in Nevada; he filed in New Hampshire.

The Estate was not probated in New Hampshire. Neither Mr. nor Mrs. Loeb were residents of New Hampshire; Mrs. Loeb was personally served in New Hampshire; the Estate owned no property in New Hampshire.

The Union Leader Corporation is a New Hampshire corporation. All of the stock of the corporation was pledged to the Security Bank of Nevada as security for a loan made to the corporation; it was physically situated in the vault of the bank at Reno, Nevada. The stock was and is owned by Nackey S. Loeb, Trustee of The William Loeb Union Leader Trust, an Intervivos Trust, over which the State of Nevada has and has exercised in rem jurisdiction. Case No. 82-5478, Second Judicial District Court of the State of Nevada.

It is not material to the issue before this Court, but respondent must take exception to petitioner's assertion that William Loeb reneged on a promise to his employees. Such is only petitioner's contention. Respondent's contention is that Mr. Loeb and his wife, the executrix herein, decided of their own free will that after the death of the last of them to survive, and of their named trustees, the stock of the newspaper would be distributed to the then-employees of the newspaper. This was published in a front-page editorial in the newspaper on May 19, 1978,

and a copy, from page 153 of the Record on Appeal, is attached as Appendix B to this brief.

On October 12, 1984, the United States District Court for the District of New Hampshire entered Judgment against plaintiff Bergeron upon his suit in that court. Appendix C. Bergeron's motion for reconsideration of that judgment has been denied. Appendix D.

ARGUMENT

I

IS THE ISSUE PRESENTED BY THIS CASE DESERVING OF CERTIORARI?

Under Supreme Court Rule 17, review is to be granted only when there are special and important reasons therefor.

The issue presented by this case will never be raised again, for no one who has filed a claim in a Nevada probate would ever hereafter fail to file suit in Nevada. Indeed it is puzzling why this claimant, having had actual knowledge of the Nevada probate, and having filed his claim in the Nevada probate, and having had Nevada counsel, did not file suit in the Nevada court. Neither Mr. nor Mrs. Loeb resided in New Hampshire, and there is no claim that they did. Nor did they have property in New Hampshire. The issue presented is not of importance to warrant review by the United States Supreme Court.

Petitioner addresses this issue by stating the decision of the Nevada Supreme Court has already begun to wreak constitutional havoc. Translation: petitioner lost in New Hampshire. Requiring a claimant to follow his claim with a suit in the same forum would not create havoc, nor is it even significant.

II

THE CONSTITUTIONAL ISSUE NOW PRESENTED WAS NOT TIMELY AND PROPERLY RAISED BEFORE THE NEVADA SUPREME COURT

Supreme Court Rule 21.1(h) requires petitioner to specify the stage in the proceedings, both in the court of first instance and in the appellate court, at which the federal questions were raised, with specific references "as will show that the federal question was timely and properly raised."

The issue before the Supreme Court of Nevada was of statutory construction: Whether the Nevada Legislature intended suit upon a claim filed in the district court, and rejected, to be filed in the district court, or whether it might be filed anywhere, such as in New Hampshire. Bergeron's brief to the Nevada Supreme Court did not cite the supremacy clause of the U.S. Constitution. Bergeron did not challenge the constitutionality of the Nevada statute. Bergeron did argue that the New Hampshire federal court was the proper court to bring suit, and cited cases in support thereof, which were cases where the suit in the federal court was brought in the same state as where the probate proceeding was pending. Bergeron argued that holding New Hampshire was not the proper court would divest it of jurisdiction—but he did not specifically argue that the Nevada statute was unconstitutional. This court can read the original Opinion of the Nevada Supreme Court and decide for itself whether or not the issue of constitutionality was raised.

As to the additional challenge now being made to the Nevada statute, that a federal court would have exclusive jurisdiction over a 15 U.S.C. Sec. 78aa action, the Nevada Supreme Court in its order denying rehearing, noted that this issue (constitutional or not) was being raised for the first time in the petition for rehearing, and was contrary to the position asserted in Bergeron's brief. Also, that

Bergeron had failed to present that argument to the Nevada district court.

(The securities issue itself is a sham issue on the facts of this case. It is not a Securities Exchange Act case. The New Hampshire court entered a Summary Judgment against the securities claim, even assuming all contentions of plaintiff to be true. The complaint, read as a whole, shows there was no "purchase or sale" of stock, without which the act is not applicable. Bergeron's Creditor's Claim filed in the Nevada district court, respondent's Appendix A, does not make a securities claim.)

Petitioner has not shown he raised constitutional issues in the court below. Even his appendix is an excerpt from his trial court memorandum, not from his supreme court brief.

III

THE NEVADA PROBATE STATUTE IS NOT UNCONSTITUTIONAL

Is it unconstitutional for Nevada to provide that when a creditor's claim is filed against a Nevada estate, and rejected, any suit brought to enforce payment of that claim must be brought in Nevada?

Bergeron filed his creditor's claim in the Nevada probate. He thereby submitted himself to the jurisdiction of the Nevada court.

Rauser v. Rauser, 52 Wis. 2d 665, 190 N.W.2d 875 (1971)

A copy of Bergeron's claim is attached to this brief as Appendix A. Bergeron had actual knowledge of the probate. He filed his claim on time. He had actual knowledge of the rejection of his claim. He did not file

suit in Nevada; he filed suit in New Hampshire on the 63rd day after notice of rejection was mailed.[1]

The public policy of the State of Nevada is that estates in probate be administered and distributed efficiently and expeditiously. This has been declared by statute and judicial decision, and is repeated in the opinion of the Nevada Supreme Court:

> "NRS 147.130(1) is part of Title 12 of the Nevada Revised Statutes, relating to wills and Estates of Deceased Persons. The entire statutory scheme set out in Title 12 demonstrates an intention on the part of the legislature to ensure the speedy and certain distribution of decedent's estates. For example, NRS 143.035 requires that an executor or administrator use reasonable diligence in administering an estate. It further requires him to file a report with the court explaining why the estate has not been closed within six months of his appointment if no federal tax return need be filed for the estate, and within eighteen months if a tax return is required. Subsection 4(c) of this statute provides for revocation of the letters of an executor or administrator who has not used reasonable diligence in the administration of an estate." Opinion, Petitioner's Appendix, page 5.
>
> * * *
>
> "As we stated in Gardner Hotel Supply v. Estate of Clark, 83 Nev. 388, 391, 432 P.2d 495, 497 (1967): 'The spirit and letter of Nevada statutes relating to the filing of claims and administration of estates speak to the policy of our laws that efficient and expedient administration is essential.' " Ibid, page 6.

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[1] The trial court also held that the suit was not timely. The Nevada Supreme Court, without discussion, stated that the claim had been filed within the requisite 60-day period.

Realistically, if a suit on a claim filed in a Nevada estate proceeding can be brought wherever the executrix can be personally served, New Hampshire, New Jersey, New York, New Mexico, or anywhere, Nevada is denied the right to efficiently and expeditiously distribute decedent's estates. The Nevada Supreme Court in its opinion said:

> "It is difficult to conceive of a less efficient method of administering an estate than to require the Nevada district court having jurisdiction over the assets of an estate to await the final adjudications, including appeals, of any number of other courts that may be considering matters which could materially and adversely affect Nevada's established authority to proceed." Ibid, page 8.

Nevada acquired jurisdiction over Bergeron in this cause March 17, 1982, when Bergeron filed his claim in the Nevada court. *Rauser v. Rauser,* supra.[2] This was long before Bergeron filed suit in New Hampshire. The Nevada Supreme Court cited *Kline v. Burke Const. Co.,* 260 U.S. 226, 229 (1922), and quoted from that opinion with part of the quotation being:

> "The converse of the rule is equally true, that where the jurisdiction of the state court has first attached, the federal court is precluded from exercising its jurisdiction over the same *res* to defeat or impair the state court's jurisdiction." Petitioner's Appendix, page 10.

Petitioner complains that the Nevada statute as construed by the Nevada Supreme Court "diminishes" the jurisdiction of the federal court in New Hampshire. Yet the Nevada trial court, and the Nevada Supreme

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[2] Failure to file suit upon a claim filed and rejected in Nevada barred subsequent suit in Wisconsin on issues which might have been litigated in the Nevada Probate Court, 190 N.W. 2d 875, 878 (1971).

Court, both said they did not purport to determine the jurisdiction of the New Hampshire court.

The Nevada trial court said:

> "This Court does not purport to decide the jurisdiction of the United States District Court in this matter, but instead only finds today the Federal action brought in New Hampshire was not timely and was the improper forum to assert relief from the denial." Petitioner's Appendix, page 22.

The Nevada Supreme Court said:

> "Although we cannot, and do not, decide the propriety of the New Hampshire federal court's exercise of jurisdiction, we do conclude that appellant's action was not brought in 'the proper court' as required by NRS 147.130(1)." Petitioner's Appendix, page 13.

The New Hampshire court said:

> "The denial of the temporary restraining order is not indicia that this court is ruling that it does not have jurisdiction in this case." Petitioner's Appendix, page 101.
>
> * * *
>
> "The court opines that on the state of the pleadings now before it this court has jurisdiction." Petitioner's Appendix, page 103.

The New Hampshire court since exercised jurisdiction by entering judgment against Bergeron and in favor of respondent. Reconsideration has been denied.

1. Has the Nevada Supreme Court Decision "Diminished" the Jurisdiction of the New Hampshire Federal Court?

It is obvious from the statements above, of both the Nevada court and the New Hampshire federal court, that it has not.

Nor is an issue of federal supremacy involved in this case.

Bergeron's Nevada claim was for breach of contract for failure to bequeath the stock of the corporation. His New Hampshire suit, excluding the securities item otherwise disposed of, was for the same breach of contract. The position of the federal court in New Hampshire is exactly the same as that of a state court in New Hampshire. Its powers are dependent upon personal service in New Hampshire or upon the New Hampshire long-arm statute. Federal preemption has nothing to do with this case. It is just the same as if the suit had been brought in the state court of New Hampshire and then removed to the federal court in New Hampshire.

It is axiomatic that the jurisdiction of the federal court in a diversity case is only the jurisdiction and process of the state court in which it is sitting.[3] The conflict, if there is one, is between the State of Nevada and the State of New Hampshire, not with the federal court. The federal supremacy clause is not applicable.

Referring to the cased cited by petitioner:

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[3]The Nevada court spoke in the context of the suit having been filed in New Hampshire. Petitioner's quote on page 15 left out the underlined words: "We simply determined that, *under the circumstances of this case* and as a matter of policy, the Nevada State District Court was the proper, more appropriate court for bringing suit on the claim under NRS 147.130(1). We therefore, deny rehearing on this ground."

Hess v. Reynolds, 113 U.S. 73 (1885) is a case which holds that the federal right of removal from state court to the federal court of the same state cannot be defeated by state law. Such cases are not relevant here. Respondent does not dispute that where federal law grants a right of removal such right exists. (However, Bergeron could not have removed from the Nevada state court to the New Hampshire federal court.)

It was a suit by Hess against the estate of Warren Sherwood. Hess himself brought the suit in the probate court but the law at that time permitted subsequent removal to the federal Circuit Court on filing an affidavit of prejudice. The decision held that the right to remove could not be defeated by state statute. The primary issue was the time when the affidavit might be filed, and whether the statute under which he sought removal was still in force. The case is not pertinent.

Clark v. Bever, 139 U.S. 96 (1891) was a suit by Clark, also brought in state court, against George Green's estate. Clark was a creditor of the Burlington Railroad and claimed that Green owed the railroad because he took stock in settlement of debt the railroad owed Green. Clark claimed that Green, who took the stock for 20% of its face value, owed the corporation the remaining 80% under principles of corporate law, even though the stock was worthless.

Clark, in some way, perhaps like Hess, removed to the federal Circuit Court of the same state. The decision said the removal was proper but Green did not have to pay. Again, this case is authority only for the proposition that a state cannot override the right to remove.

Harrison v. St. Louis and San Francisco Railroad Co., 232 U.S. 318 (1914) was also a same state removal case, holding that Oklahoma could not prevent removal by the railroad company through the device of revoking its charter to do business in Oklahoma.

Chicago & Northwestern Railroad Co. v. Whitton, 80 U.S. 270 (1871) likewise was a same state case, not a probate case, where the wife of the plaintiff was killed crossing the track and the railroad removed to federal court.

Petitioner's next group of cases are more relevant in that they do involve suits where they have been brought by the plaintiff in federal court, rather than removed, but they again all involve same state cases. The suits were brought in the federal court in the same state where the probate was pending.

Markham v. Allen, 326 U.S. 490 (1946) is the leading case establishing the principles where a federal court may or may not involve itself with a state probate proceedings. It will be cited and relied upon later in this brief. It is relevant to the ambit of the so-called probate exception. It is not relevant to the propriety of suit being brought in a federal court of a different state from that in which probate is being had. Markham was the Alien Property Custodian acting under the Trading with the Enemy Act. He brought suit in federal court in California in relation to an estate being administered in the Superior Court of California. The decision was that he was entitled to sue in the California federal court instead of in the California state court.

Waterman v. Canal-Louisiana Bank & Trust Co., 215 U.S. 33 (1909) shows Mrs. Waterman suing the bank in federal court in Louisiana to determine her interest in an alleged lapsed legacy in an estate being probated in Louisiana. Again, it was a same state case.

Wells Fargo & Co. v. Wells Fargo Express Co., 556 F.2d 406 (9th Cir. 1977), a trademark case against a Lichtenstein corporation, is cited for the proposition that the trial court had jurisdiction to determine its own jurisdiction, which is not an issue here.

Markham v. City of Newport News, 292 F.2d 711 (4th Cir. 1961) where the plaintiff and her vehicle fell into a sewer manhole, said that in determining its own jurisdiction a federal district court must look to the sources of its power.

Of the cases cited in Footnote 7 of petitioner's brief, *Greyhound, Rosenberg* and *Monogram* were same state cases. *U.S. v. Swanson*, same state, was for money loaned by the United States to the decedent, and *U.S. v. Estate of Slate*, same state, was to collect taxes. *Hurlburt* was a same state case. None of these indicate Nevada diminished the jurisdiction of New Hampshire.

The remaining cases cited by petitioner, *Lamberg, Beach, Akin, Rosenberg, Lee* and *Lummis's*, are all also same state cases. The cases in petitioner's Footnote 8 are antitrust or patent, and the Nevada case in Footnote 9, *Federal Savings*, is merely substitution of the executrix for the decedent.

None of the cases cited by petitioner conflict with the right of the State of Nevada to require a suit upon a rejected claim be brought in Nevada.

2. Federal Law Recognizes the Right of the States to Control the Administration of Decedent's Estates.

A. The Probate Exception

The states have the right to determine who shall participate in the distribution of their decedents' estates. They presumably could declare estates forfeited to the crown (a 100% tax), or descend only to the eldest son, or not be subject to the claims of creditors. (Joint tenancy property is not subject to the claims of creditors.)

Nevada has a statutory scheme for distribution of estates. It includes payment of creditors, provided they file a claim, and, when rejected, sue in "the proper court."

The proper court, Nevada says, is the district court where the probate is pending.

By contrast, the laws of some other states impose no statutory restriction on the place where suit must be brought. Nevada, however, does; perhaps that attention to detail, among others, accounts for Nevada estates being expeditiously administered.

Is that requirement unconstitutional or even unreasonable? The New Hampshire federal court obviously does not think so. In its Order of December 11, 1984, which denied reconsideration of the judgment entered against Bergeron, October 12, 1984, it said:

> "The continued exercise of concurrent jurisdiction would substantially interfere with the strong state policy in the orderly administration of estates and trusts. *Markham v. Allen,* 326 U.S. 490 (1945); *Waterman,* supra; *Buck v. Hales,* 536 F.2d 1330 (10th Cir. 1976), (administration of a trust)." Respondent's Appendix D, page A-12

* * *

> "The exercise of federal review would also disrupt the Nevada efforts to establish coherent public policy on the definition of 'proper court' for filing probate claims, *Bergeron v. Loeb*, supra; *Burford v. Sun Oil Co.*, 319 U.S. 315 (1943)."Ibid., page A-12

Markham v. Allen, supra, the California Alien Property Custodian case, is the landmark case stating that federal courts of equity (same state) have jurisdiction to entertain suits in favor of creditors

> "so long as the federal court does not interfere with the probate proceedings or assume general jurisdiction of the probate or control of the property in the custody of the state court."

In the instant case, adjudication in New Hampshire of Bergeron's claim against the estate would interfere with the probate proceeding as established by Nevada law. It also would assume control of the property in the custody of the state court.

Bergeron's creditor's claim, Appendix A, was for a pro rata share of the actual stock of the company. His suit sought to "return the stock to Loeb's estate for distribution to Bergeron and the class he represents." Petitioner's Footnote 1, page 5. This would be an assumption of control of the property in the custody of the state court. *Ewald v. Citizens Fidelity Bank & Trust Co.*, 242 F.2d 319 (6th Cir. 1957).

Bergeron's suit was for equitable relief and for recovery of the stock itself. There was no suit for money damages as Bergeron's brief, page 12, asserts, referring to "his prayer for money damages." There is no prayer for money damages. See petitioner's Appendix E, page 82, and prayers to the previous counts.

The oft-quoted statement from *Princess Lida of Thurn and Taxis v. Thompson*, 305 U.S. 456 (1939), is that where the judgment is strictly in personam, both state and federal court may proceed until judgment is obtained in one of them. But if the two suits are in rem so that the court has possession or must have control of the property, to grant the relief sought, the jurisdiction of one court must yield to that of the other. The principle applicable to both federal and state courts is that the court first assuming jurisdiction over the property, may maintain and exercise that jurisdiction to the exclusion of the other. The doctrine is necessary to the harmonious cooperation of federal and state tribunals.

Here, the stock is, and throughout the entire period of time referred to, has been, within the in rem jurisdiction of the Second Judicial District Court of the State of Nevada. It also was the first court to have jurisdiction in

this case, even in personam jurisdiction over Bergeron when he filed his claim. It therefore should be the forum for resolution of the dispute, which, as pointed out above is for ownership of the stock.

The *Princess Lida* case states that the doctrine has no application to a case where the plaintiff seeks merely adjudication of his right or interest as the basis of a claim against *a fund* in the possession of an estate. Bergeron's claim is not a mere claim for an interest in a fund—he is claiming the res—the stock.

In the case of *U.S. v. Bank of New York & Trust Co.*, 296 U.S. 463 (1936), the United States filed suit in federal district court claiming ownership of a fund, which was currently under the jurisdiction of the State Court of Appeals and being administered by a state court appointed agent. Both courts sought to establish jurisdiction of the res. The Supreme Court rejected the government's argument that the suit in the federal district court was one in personam because the government demanded that the court appointed agent pay over to the United States the entire amount of the fund. The court concluded at page 478 that: ". . . the object of the suit is to take the property from the depositories and from the control of the state court and to vest the property in the United States to the exclusion of all those whose claims are being adjudicated in the state proceedings." Accordingly, where the party seeks ownership and possession of the entire res, the suits are in rem, and the court must have possession or control of the res in order to proceed with the cause and to grant the relief sought.

In the case at bar, petitioner in his complaint prays for an order vesting title of the Union Leader Corporation stock in the name of plaintiff and other employees of the corporation and to transfer and deliver to plaintiff

and all employees of the corporation their respective proportionate shares of ownership of the stock. Petitioner's demand, therefore, is equivalent to the government's demand in the *U.S. v. Bank of New York & Trust Co.* case, which makes this action one in rem, and subject to the jurisdiction of the State Court of Nevada which exercised control over the res.

Nevada probate proceedings are in rem proceedings. NRS 136.010. See generally Bancroft's Probate Practice Sec. 40 (2nd ed. 1950). When the notice provisions of the probate statutes are complied with, " . . . the entire world is called before the court, and the court acquires jurisdiction thereby over the estate and over all persons for the purpose of determining their rights to any portion of the estate . . . " *Monk v. Morgan*, 192 P.1042, 1044 (1920); Bancroft's Probate Practice, supra, Sec. 61. Every person interested in an estate, including a creditor, is a party to the proceeding, and the action of the court, whether he appears and presents his claim or not, is equally conclusive upon him. *Monk v. Morgan*, supra.

Rice v. Rice Foundation, 610 F.2d 471 (7th Cir. 1979), noted that the probate exception is a serious question of subject matter jurisdiction, and pointed out that applying the principle to a particular set of facts is not easy. Here, particular facts are:

A. Bergeron submitted to the jurisdiction of the Nevada district court when he filed his claim and has been vigorously litigating there ever since.

B. Nevada has a strong public policy for rejected claims to be resolved in the district court where the probate is pending.

C. It is a sound policy and an integral part of the estate distribution scheme.

D. The res is Nevada.

E. Jurisdiction first attached in Nevada.

Therefore, respondent submits that the situation presented by this particular case is within the probate exception.

Referring to petitioner's additional cases: in *DiTinno*, Massachusetts abstained; in *Farrell*, this court affirmed a decision that the probate exception applied.

In *Looney v. Capital National Bank*, 235 F.2d 436 (5th Cir. 1956), the question was the validity of a trust, and the court said, where the state court of general jurisdiction was granted the power to determine inter partes, the validity vel non of provisions of a will, "a United States court in that state has jurisdiction to entertain such an action . . . so long as it does not interfere with the administration of the estate in a state court." Note that the court said a United States court *in that state*. It cited *Simlar v. Wilson*, 210 F.2d 99, which also expressly said "in that state."

Holt was quiet title; *Anderson* was a reciprocal will; *Brownell* denied an attempt to reopen a probate; *Blakeman* was mismanagement of a corporation; *Quinlan* a void will.

None of these cases are close enough factually to affirm or deny the probate exception here.

In *Rice v. Sayers*, 198 F.2d 724 (1952), another 10th Circuit decision, Kansas had a statute which vested exclusive jurisdiction of actions to contest wills in the state probate court; because it was a probate court, and not a court of general jurisdiction, the circuit court ordered the action dismissed with prejudice. Respondent thinks that the name of the court should not make a difference. If a state declares that a specific court has exclusive jurisdiction to make a specific determination in respect to a rejected probate claim, should not that be enough to require the claimant to sue in that court?

Respondent submits that whether it be termed the probate exception, an election of forum, jurisdiction of res, or first attachment of jurisdiction, that it was not unconstitutional to require Bergeron to proceed in the Nevada district court.

In *DeWitt v. Duce*, 675 F.2d 670 (5th Cir. 1982), plaintiff filed a diversity action for wrongful interference with inheritance. The district court dismissed for lack of subject matter jurisdiction because the case dealt with state probate matters. The circuit court reversed and remanded. On remand, the district court held that plaintiffs were precluded by Florida law. On appeal, the circuit court certified the question to the Supreme Court of Florida — did Florida law preclude plaintiffs from proving tortious interference where plaintiffs had notice of the probate proceeding and an opportunity to contest the validity of the will but chose not to do so?

The Supreme Court of Florida answered that plaintiffs had an adequate remedy in probate court for their grievance with fair opportunity to pursue it and were barred by Florida law from a subsequent action. The circuit court then held that the district court had properly dismissed the action.

So, here, Bergeron had an adequate remedy in the Nevada probate court and a fair opportunity to pursue it. By Nevada law, he was barred from subsequent action. The Nevada decision should stand.

B. Abstention

The citations show that the federal court has ample precedent and reason to abstain. *Rice v. Rice Foundation*, supra; *Bassler v. Arrowood*, 500 F.2d 138 (8th Cir., 1974).

If the abstention doctrine requires clarification, that should come in an appeal from a federal court decision, not here.

CONCLUSION

Therefore, respondent submits that Nevada has not diminished the jurisdiction of the federal court in New Hampshire; that the power of the New Hampshire federal court is derived from the state law of New Hampshire with the diversity element only incidental; that there is no supremacy issue in this case between federal and state court; that the Nevada requirement that suit upon a rejected claim be brought in the district court in Nevada is constitutional under the facts of this case.

No "first raised" arguments are made in this Brief in Opposition.

Respondent submits the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

PRINCE A. HAWKINS
HAWKINS, RHODES & SHARP

RALPH WARREN SULLIVAN
MALLOY AND SULLIVAN

Attorneys for Respondent
Nackey S. Loeb,
Executrix

January 1985

EDITOR'S NOTE

THE FOLLOWING PAGES WERE POOR HARD COPY AT THE TIME OF FILMING. IF AND WHEN A BETTER COPY CAN BE OBTAINED, A NEW FICHE WILL BE ISSUED.

In the Second Judicial District Court

Of the State of Nevada, in and for the County of Washoe.

No. 81-10236

Dept. No. _____

IN THE MATTER OF THE ESTATE OF

WILLIAM LOEB

Deceased.

Petitioner's Ex. A For Ident.

'82 MAR 17 P2:27

BY _____ DEPUTY

GENERAL CLAIM

Claim of Richard R. Bergeron, RFD 2, Danis Park Road, Goffstown, N.H. 03045
NAME ADDRESS

The undersigned creditor of the above-named deceased presents this claim against the deceased, a statement of which is hereto annexed, marked "A".

		$
See Attachment "A"		
Market Value of Union Leader Corp. a/o 9/13/81	divided by:	Total number of ULC full-time common law employees a/o 9/13/81
or alternatively		
Total issued and outstanding shares of Union Leader Corporation	divided by:	Total Number of Union Leader Corporation common law employees a/o 9/13/81

STATE OF ~~NEVADA~~ NEW HAMPSHIRE
COUNTY OF ~~WASHOE~~ HILLSBOROUGH } SS.

The undersigned, being duly sworn, says: that he is the undersigned creditor named in and who makes the foregoing claim against the estate of WILLIAM LOEB, deceased, that the amount of said claim, to wit: the sum of [See above] ~~DOLLARS~~, is justly due to said claimant; that no payments have been made thereon which are not credited, and there are no offsets to the same to the knowledge of this affiant; that affiant has personal knowledge of all the facts of said claim.

Richard R. Bergeron

My Commission Expires:
August 27, 1985

Subscribed and sworn to before me this 16th day of March, 19 82

~~NOTARY PUBLIC~~ Notary Public

~~IN AND FOR~~

The within claim is _____ APPROVED/DISAPPROVED this _____ day of _____, 19____.

EXECUTOR OR ADMINISTRATOR

Allowed and approved for $ _____ this _____ day of _____, 19____.

CERTIFIED COPY

The document to which this certificate is attached is a full, true and correct copy of the original on file and of record in my office.

DATE: December 28, 1984

JUDITH [illegible]AIN, Supreme Court Clerk,
State of Nevada

By Joanne C. Dilard Deputy

ATTACHMENT "A"

The deceased, William Loeb, was sole owner and shareholder of the Union Leader Corporation, incorporated and doing business in the State of New Hampshire. On numerous occasions and to induce the loyal service of myself and other employees of his company, the deceased repeatedly stated that, upon his death, ownership of the company would be divided among and devised to its then employees who were such as of his death.

As of September 13, 1981, the date of Mr. Loeb's death, the undersigned was a full time employee of the Union Leader Corporation and entitled to receive a pro rata share of the company, or its cash equivalent, as a creditor of the decedent's estate. Although the undersigned cannot state the specific dollar value of this claim, my rightful share of ownership of the Union Leader Corporation can be expressed as follows:

Market Value of Union Leader Corp. a/o 9/13/81	divided by:	Total number of ULC full-time common law employees a/o 9/13/81

or alternatively

Total issued and outstanding shares of Union Leader Corporation	divided by:	Total Number of Union Leader Corporation common law employees a/o 9/13/81

CERTIFIED COPY
The document to which this certificate is attached is a full, true and correct copy of the original on file and of record in my office.
DATE: July 14, 1982
[illegible], Clerk of the Second Judicial District Court, in and for the County of [illegible], Nevada.
By [illegible] Deputy.

Richard R. Bergeron

CERTIFIED COPY
The document to which this certificate is attached is a full, true and correct copy of the original on file and of record in my office.
DATE: December 28, 1984
JUDITH FOUNTAIN, Supreme Court Clerk, State of Nevada
By Joann C. Richards Deputy

No. 81-10236
Estate of
Lillian Robb
Tarrant

Admitted to Probate
JUDY BLEVINS, CLERK
BY [signature]
DEPUTY

116th YEAR — NUMBER 43 — 48 PAGES

5-

An Editorial

For the Future

In considering the future, it has always been the overwhelming desire of this Publisher that the Union Leader continue for many decades more its battle and fight for the rights of ALL the people — and not to be the voice of any special interest or of any political party.

The second desire of this Publisher, looking into the future, has always been that the people associated with this paper, who have worked to produce it every day and whose leadership and devotion to the paper have made it the great institution that it is, should be protected in the future, when this Publisher is no longer around.

In order to achieve these two objectives, the Publisher of this paper has made a will which provides that on his death the paper will go to a trust whose sole trustee, while she is alive, will be the Publisher's wife, Nackey Scripps Loeb.

AN EDITORIAL Page 24

An Editorial

For the Future

(Continued from Page One)

After her death, or if both the Publisher and his wife should be killed in a common disaster, as almost happened on Washoe Hill in Nevada just before Christmas last year, the trustees running the trust will be some of the men presently involved in the management of the newspapers.

These trustees will operate the paper and have complete control of it. All profits beyond expenses will be shared with the employes in proportion to their salaries, multiplied by the number of years that they have been with the paper.

The trust will continue until the last one of the trustees appointed by the Publisher dies.

At that point, the trust will be dissolved and the stock of the newspaper distributed to the then employes of the paper — again in proportion to their own salaries multiplied by the period they have been with the paper.

Considering the fact that some of the trustees are in their early thirties, this event should not occur, barring a universal disaster, for another 40 years or more. At that point, anyone who is now alive and thinks he can predict the future is conceited beyond belief!

However, as this Publisher has said, it is his hope that this paper in the next 40 years will continue to serve only the interests of the people, without fear or favor. We hope it will also be a credit to our God and our country, and of course, especially to the State of New Hampshire.

William Loeb

William Loeb, Publisher

CERTIFIED COPY

The document to which this certificate is attached is a full, true and correct copy of the original on file and of record in my office.

DATE: December 28, 1984
JUDITH FOUNTAIN, Supreme Court Clerk,
State of Nevada
By Jeanne S. Richards Deputy

81-10236
Estate of
William Loeb
Petitioner

Admitted 7/20 19 83
JUDY CALLEY, CLERK
BY J. Denham
DEPUTY

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APPENDIX C

United States District Court for the
District of New Hampshire
Civil Action No. 82-317-L

Richard R. Bergeron
v.
Estate of William Loeb
The William Loeb Union Leader Trust
Nackey S. Loeb, individually as Executrix
of the Estate of William Loeb,
and as Trustee of The William Loeb
Union Leader Trust and the
Security National Bank of Nevada

JUDGMENT

In accordance with the granting of Defendants' Motion To Dismiss and Motion for Summary Judgment on October 12, 1984 by the Honorable Martin F. Loughlin, United States District Judge, judgment is hereby entered.

By the Court,
KATHLEEN NORTHRUP
Clerk

October 12, 1984
cc: Alan P. Cleveland, Esq.
Ralph Warren Sullivan, Esq.

APPENDIX D

The United States District Court For The District of New Hampshire

C82-317-L

Richard R. Bergeron, et al.

v.

Estate of William Loeb, et al.

ORDER ON MOTION FOR CLARIFICATION

The United States District Court for the District of New Hampshire granted defendants' motions to dismiss and summary judgment on October 12, 1984. The plaintiffs' motion for reconsideration and oral motion to hold in abeyance are denied. The motion for clarification is granted.

William Loeb died on September 13, 1981. Nackey S. Loeb, his wife, was appointed executrix of his estate and trustee of the "Union Leader Trust" (trust) pursuant to the probate by the State of Nevada.

Under Nevada probate procedures, a general claim was made by the plaintiff class against the estate and trust which involved 3,750 shares of the Union Leader Corporation stock (the securities). These shares of stock were under the jurisdiction and possession of a Nevada probate court.

Nackey Loeb rejected the claim on April 5, 1982. Rather than following the procedures of Nevada to request a hearing before the probate court, the plaintiffs instigated suit on June 7, 1982 in this district court, referred to as the federal court.

The suit was certified as a class action on behalf of willing employees of the Union Leader Corporation as of September 13, 1981.

The complaint is summarized as follows:

Count I alleges fraudulent conduct on the part of all defendants in the purchase and sale of the Union Leader Corporation securities by means of interstate commerce. The conduct violates the Securities Exchange Act of 1934, as amended (the "Exchange Act"), 15 U.S.C. §§ 78 et seq., and Rule 10(b). As such, the court has jurisdiction under 28 U.S.C. § 1331.

Count II alleges a breach of common law contract in the failure by the defendants to perform an agreement to transfer the ownership of the securities upon the death of William Loeb.

Count III alleges a violation of the New Hampshire Uniform Fraudulent Conveyance Act, RSA 545:1 upon the *inter vivos* transfer of the securities to the trust on August 17, 1979.

Count IV alleges the pledge of the securities to the Security National Bank (SNB) on August 25, 1980 was fraudulent conveyance and that the Bank was a party to the fraud.

Count V alleges that Massachusetts law and not the Nevada community property rules applied, that the Second Amendment to the trust was invalid, that the amendment was made to defraud the employee-creditors and that the execution of the amendment was therefore a fraudulent conveyance of a half interest in the securities to Nackey Loeb.

Counts II through V are properly before the court there being diversity of citizenship among the parties. 28 U.S.C. § 1332. The plaintiff also seeks a declaration of rights. 28 U.S.C. § 2201 et seq.

After this court received the complaint, Nackey Loeb filed a "Petition for Declaration of Rights and for Judgment that Creditors' Claim is Barred" in the Second Judicial Court in the State of Nevada in and for the County of Washoe (Nevada Court). The defendant there, Plaintiff Bergeron, et al here, submitted to the jurisdiction of the Nevada court and answered the complaint on June 28,1982. As a result of that action, the Nevada court rules that the same claim as made in this federal court was forever barred. The Nevada Supreme Court affirmed the Nevada District Court. *Bergeron v. Loeb,* Slip opinion No. 14465. (Nev. January 25, 1984), reh. denied, October, 1984.

In light of the Nevada final judgment on October 4, 1984, this court granted defendants' motion to dismiss based upon the abstention doctrine. This court also granted defendant's motion for summary judgment on the "Exchange Act" count I of the complaint, (Order dated October 12, 1984). This court had held the matter in abeyance pending the request for rehearing pending before the Nevada Supreme Court from June 16, 1984.

The claims set forth in Counts II, III, IV and V are ones which this court had concurrent jurisdiction with the Nevada courts' proceedings.

The United States Supreme Court has recently reaffirmed the discretionary power of the district courts to dismiss an action to avoid concurrent jurisdiction which would conflict with comity. *Moses H. Cone Memorial Hospital v. Mercury Construction Corporation,* 460 U.S. 1, (1983); *Moses H. Cone, Meredith v. City of Winter Haven,* 320 U.S. 228, 234 (1943).

Under the so-called exceptional circumstances test,

> [t]he decision whether to dismiss a federal action because of parallel state court litigation does not rest on a mechanical checklist, but on a careful balancing

> of the important factors as they apply in a given case, with the balance heavily weighted in favor of the exercise of jurisdiction.

Moses H. Cone, Supra, at 16. Upon a balancing of the factors, the court finds several grounds which favor the application of abstention.

The allegation contained in plaintiff counts II, III, IV and V are claims which were litigated or which could have been litigated by affirmative defenses or cross claims in the Nevada "Declaration of Rights" proceedings. As of the date of this order, a final judgment has been rendered by the Nevada Supreme Court. *Bergeron v. Loeb, supra.*

> The declaratory judgment entered by the state chancery court has the force and effect of a final judgment and is binding upon the parties in subsequent actions.

Continental Insurance Company v. South Jersey Gas Co., 409 F. Supp. 1130, 1132 (D.N.J. 1976).

If a Writ of Certiorari to the United States Supreme Court is not brought, is denied, or is affirmed the Nevada decision would have a *res judicata* effect on this court.

> The outlines of the rule are clearly set forth in *Commissioner v. Sunnen,* 333 U.S. 591, 68 S. Ct. 715, 92 L.Ed. 898 (1947):
>
> > The rule provides that when a court of competent jurisdiction has entered a final judgment on the merits of a cause of action, the parties to the suit and their privies are thereafter bound not only as to every matter which was offered and received to sustain or defeat the claim or demand, but as to any other admissible matter which might have been offered for that purpose. (Citations omitted).

Walsh v. International Longshoreman's Ass., AFL-CIO, 630 F.2d 864, 867 (1st Cir. 1980). That judgment states that

the creditor's claim by Bergeron is forever barred against the estate and trust. Thus, if the decision is respected by this federal court, the claims are moot.

In light of the likelihood that the issues before the court are moot, the continued exercise of jurisdiction would waste judicial resources. *Moses H. Cone, supra.*

If this court does give *res judicata* effect to the Nevada judgment, this action would cause piecemeal adjudication of the rights to the estate and trust of William Loeb. *Colorado River Water Conservation District v. United States,* 424 U.S. 800 (1976), *(Colorado River).* Probate and trust administrations are fields which are "peculiarly appropriate for comprehensive treatment in the forums having the greatest experience and expertise". *Id* at 819-20. Piecemeal adjudication should be avoided here.

The continued exercise of concurrent jurisdiction would substantially interfere with the strong state policy in the orderly administration of estate and trusts. *Markham v. Allen,* 326 U.S. 490 (1945); *Waterman, supra; Buck v. Hales,* 536 F.2d 1330 (10th Cir. 1976), (administration of a trust). The pending suit would affect the bulk of the assets of the estate and the entire corpus of the trust. Count V contests the validity of a trust instrument and choice of law selected by the Nevada courts. Clearly, the federal suit amounts to an examination of the general administration of estates and trusts by the Nevada courts which this court declines to do. *See, Kittrege v. Stevens,* 126 F.2d 263, (1st Cir. 1942).

The exercise of federal review would also disrupt the Nevada efforts to establish a coherent public policy on the definition of a "proper court" for filing probate claims. *Bergeron v. Loeb, supra; Burford v. Sun Oil Co.,* 319 U.S. 315 (1943).

The conflicts with comity and avoidance of piecemeal litigation are not avoided if this court restricts its judgment to a declaration of rights. Where a prayer for injunctive relief is not premature, claims pursuant to the Declaratory Judgment Act are decided by the same standards as those for claims based on diversity of citizenship. *PBG Industries, Inc. v. Continental Oil Co.*, 478 F.2d 647, 679 (5th Cir. 1973). As an injunction is not premature and the issues of the case are ripe, the court may properly abstain.

The court now turns to count I of the complaint. Abstention does not apply because the federal courts have exclusive jurisdiction of Security Exchange Act claims. 15 U.S.C. § 78 aa. A review of the pleadings, affidavits and all other papers filed with the court indicate the following facts and reasonable inferences in a light most favorable to the non-moving party. *Pignons S.A. de Mecqnique de Precision v. Polaroid Corporation*, 657 F.2d 482, 486(1st Cir. 1981).

On April 29, 1949 William Loeb was the sole owner of 5,000 shares of Union Leader Corporation stock (Corporation), representing the entire authorized and issued capital stock of the Corporation.

In 1949 William Loeb started the cash profit-sharing plan covering the Corporation employees. The plan provided for 50% of the Corporation's profits before taxes to be annually distributed among the employees.

On September 26, 1956 William Loeb created the retirement profit sharing plan and trust for the benefit of employees (called deferred profit sharing plan).

On September 30, 1956 through July 17, 1960 William Loeb sold 1,250 shares of corporation stock to the deferred profit sharing plan for $375,000 in cash from the plan.

In 1957 William Loeb founded the *Haverhill Journal.* The employees agree to Loeb's request to terminate the 1949 cash profit sharing plan. Between 1949 and 1957 the employees received $696,472.81 from this plan. In exchange Loeb promised the employees that they would receiv ownership of the Corporation upon his death. Loeb reaffirmed this promise of Corporate ownership when he extracted promises of loyalty, forebearance from seeking overtime pay, higher wages and compensation and benefits from the employees during the Haverhill venture.

In 1959 William Loeb retroactively deleted the mandatory payment contributions in the deferred profit sharing plan and stopped payments. Between 1956-1957 the plan accumulated $270,000 in the employees' individual accounts. Loeb told the employees this money would be returned to them when they received ownership of the Corporation because every $1.00 used to finance the Haverhill paper, rather than being put into the deferred profit sharing plan could be expected to increase $40.00 in value.

On May 1, 1959 William Loeb pledged to Alexander R. Cymrot a Director of the Corporation, all Corporation stock held in Loeb's name as collateral for a $300,000 loan. An additional borrowing of $200,000 by the Corporation from Cymrot is evidenced by loan agreements dated June 1, 1959 and June 1, 1960.

On April 8, 1963 William Loeb borrowed $500,000 from the Teamsters Central States, Southeast and Southwest Areas Pension Fund (Teamsters) to repay Cymrot. Loeb pledged 3,750 shares of the Corporation owned by him and not held in trust by the deferred profit sharing plan.

June 25, 1965, William Loeb borrowed $2,000,000 from the Teamsters to repay the 1963 loan. Loeb pledged

all Corporation stock held by him as shareholder of record.

On March 7, 1979 the Corporation borrowed $900,000 from the Security National Bank of Nevada (SNB) to pay the 1965 Teamsters loan. William Loeb regained possession of the 3,750 shares of Corporation stock.

On August 17, 1979 William Loeb created the William Loeb Union Leader Trust (Trust). Nackey Loeb was appointed sole trustee. Ten successor trustees were also appointed and after the death of the next to last survivor of the successor trustees the employees will receive ownership of the Corporation. William Loeb transferred all his 3,750 shares to the Trust.

On August 25,1980 William and Nackey Loeb and the Trust pledged the 3,750 shares to SNB for a $2,000,000 loan. This money was used to buy 1,250 Shares of Corporation held by Augsbury Organization, Inc. Upon receipt of the 1,250 shares they were retired by Loeb as Treasury stock.

On September 13, 1981 William Loeb died. Since May 1, 1959 until this date, excluding August 17, 1979—August 25, 1980 all 3,750 shares of Corporation stock held by William Loeb remained pledged and were physically possessed by third party creditors and/or the Corporation.

September 13, 1981 the trust pledged 3,750 shares of Corporation stock to SNB.

The standard for summary judgment utilized in the First Circuit is derived from *Astra Pharmaceutical Corp v. Beckman Instruments, Inc*, 718 F.2d 1201,1204 (1st Cir. 1983). If the pleadings depositions, answer to interrogatories and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. *Pignons S.A. de Mecanique*

de Precision v. Polaroid Corporation, 657 F.2d 482, 486 (1st Cir. 1981). A dispute of fact is material if it "affects the outcome of the litigation" and is "genuine if manifested by substantial evidence going beyond the allegations of the complaint. *Pignons* 657 F.2d at 486, *Hahn v. Sargent*, 523 F.2d 461, 464 (1st Cir. 1975), *cert. denied*, 425 U.S. 904, 96 S. Ct. 1495, 47 L.Ed.2d 54 (1976).

In order to maintain an action under Section 10(b) of the Exchange Act, 15 U.S.C. § 78 (aa) as amended, Rule 10 b-5 and 17 C.F.R. § 240.106-5, the plaintiff must demonstrate that the fraud alleged was directly associated with a "purchase or sale of securities". *Rodriguez Cadiz v. Mercado Jimenez*, 579 F. Supp. 1176, 1179-80 (D.P.R., 1983).

The plaintiff alleges that the class of employees were beneficiaries of a constructive trust or that they were entitled to specific perfomance of an oral promise to deliver ownership of the shares in question upon the death of William Loeb. By analogy, the emplyees would be in the same position as employees under a formal, non-contributory pension plan or employee stock ownership plan. In either case, the employer-manager would owe a duty to the employees according to the terms of the agreement. See 56 C.J.S. § 169.

The law is well-established that the Exchange Act does not apply to non-contributory, compulsory pension plans, or to employee stock ownership plans. Generally, the courts have found that there is no affirmative investment decision and no furnishing of "value" by the employees. *Bauman v. Bish*, 571 F. Supp. 1054, 1064 (N.D. W. Va., 1983). The United States Supreme Court stated in *International Brotherhood of Teamsters v. Dainel*, 439 U.S. 551, 560 (1979) that the establishing of a right to the stocks by the faithful service of employees is not a "purchase or sale". The court said:

> Only in the most abstract sense may it be said that an employee "exchanges" some portion of his labor in return for these possible benefits. He surrenders his labor as a whole, and in return receives a compensation package that is substantially devoid of aspects resembling a security. An employee is selling his labor primarily to obtain a livelihood, not making an investment. 439 U.S. at 560.

439 U.S. at 560.

The plaintiff's claim against the defendants concerning the use of the stock as collateral for a loan from the Security National Bank of Nevada (SNB) and the Teamster loans must also fail because there was no violation of the Securities Act in those transactions.

> The purpose of §10(b) and Rule 10b-6 is to protect persons who are deceived in securities transactions—to make sure that buyers of securities get what they think they are getting and that sellers of securities are not tricked into parting with something for a price known to the buyer to be inadequate or for a consideration known to the buyer not to be what it purports to be . . . The Act and Rule impose liability or a proscribed act in connection with the purchase or sale of a security; it is not sufficient to allege that a defendant has committed a proscribed act in a transaction of which the pledge of a security is a part.

Chemical Band v. Arthur Anderson & Co., 726 F.2d 930, 943 (2nd Cir. 1984). There is no evidence that SNB or the Teamsters were defrauded because the equitable lien in favor of the employees was not disclosed, in which case only SNB and the Teamsters would have standing as an aggrieved party. *Wright v. Heizer Corporation*, 411 F. Supp. 23, 31-33 (N.D. Ill. E.D., 1975).

The Securities Acts were not intended to be vehicles for attacking fraudulent mismanagement of corporate affairs, a pension plan or trust, but rather were established to protect defrauded purchasers and sellers of securities. *Birnbaum v. Newport Steel Corp.*, 193 F. 2d 461 (2nd Cir. 1952); *cert. denied* 343 U.S. 945 (1952). The 1979 transfer of shares to the William Loeb Union Leader Trust would amount to fraudulent mismanagement because the shares were placed in an irrevocable trust contrary to the original alleged agreement conferring the corporation's ownership to the employees until William Loeb's death. The existence of the trust virtually places corporate ownership out of plaintiff's reach and similarly situated employees' reach. However, even granting that this is mismanagement of a trust, the fraudulent transfer is not a purchase or sale and does not qualify as a cause of action under the Securities Act.

The motion to dismiss shall stand for the counts II through V based upon abstention. Upon a careful review of facts and allegations connected with Count I under the "Exchange Act", motion for summary judgment in favor of the defendant remains.

So Ordered.

December 11,1984

/s/ MARTIN F. LOUGHLIN
Martin F. Loughlin
U.S. District Judge

Alan P. Cleveland, Esq.
Ralph Warren Sullivan, Esq.